Office Supreme Court, U. S.
FILED
MAR 18 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

October Term, 1919.

No. 280

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

PETITIONER,

v.

YORK & WHITNEY COMPANY,

RESPONDENT.

Petition for Writ of Certiorari and Brief in Support Thereof.

ADDISON C. GUTCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page.
NOTICE	1
PETITION FOR WRIT OF CERTIORARI	3
BRIEF IN SUPPORT OF PETITION	9
A. Authority for the issuance of the writ	9
B. The State Court erred in holding that the plaintiff could not recover	11
1. The Interstate Commerce Act	11
2. The interstate bill of lading	14
3. Discrimination	15

CASES CITED.

Armour Packing Co. v. United States, 209 U.S. 56	13
Atchison, Topeka & Santa Fe Ry. v. Robinson, 233 U.S. 173	13
Boston & Maine R.R. v. Hooker, 233 U.S. 97	14
Chicago & Alton R.R. v. Kirby, 255 U.S. 155	13, 14
Cincinnati, New Orleans & Texas Pacific Ry. v. Rankin, 241 U.S. 319	10
Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Dettlebach, 239 U.S. 588	10
Dayton Coal & Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry., 239 U.S. 446	12
Erie R.R. v. Stone, 244 U.S. 332	14, 15
Georgia, Florida & Alabama Ry. v. Blish Milling Co., 241 U.S. 190	10, 15
Gulf, Colorado & Santa Fe Ry. v. Texas Packing Co., 244 U.S. 31	10
Haire v. Rice, 204 U.S. 291	10
Kansas City Southern Ry. v. Carl, 227 U.S. 639	12
Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94	12

Page.

Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 12, 13

Metz Co. v. Boston & Maine R.R., 227 Mass. 307 14, 15

Missouri, Kansas & Texas Ry. v. Elliott, 184 U.S. 530 11

Missouri, Kansas & Texas Ry. v. Ward, 244 U.S. 383 15

New York Central R.R. Co. v. Goldberg, 250 U.S. 85 11

Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184 12

Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577 10, 12, 13

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 11

Rothschild v. Knight, 184 U.S. 334 10

St. Louis, Iron Mountain & Southern Ry. v. Starbird, 243 U.S. 592 11

Southern Express Co. v. Byers, 240 U.S. 612 10

Southern Pacific Co. v. Industrial Accident Commission, 251 U.S. 259 11

Southern Ry. v. Prescott, 240 U.S. 632 15

Texas & Pacific Ry. v. Leatherwood, 250 U.S. 478 11, 15

Texas & Pacific Ry. v. Mugg, 202 U.S. 242 12

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 802.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
PETITIONER,
v.
YORK & WHITNEY COMPANY,
RESPONDENT.

NOTICE.

The respondent is hereby notified that the petitioner will on Monday, April 19, 1920, submit its petition for a writ of certiorari at the opening of the Court on that day. A copy of the said petition and of the brief in support thereof are herewith delivered to you.

W. L. PARSONS,
Counsel for the Petitioner.

Due service of the foregoing notice, together with a copy of the petition for a writ of certiorari and brief in support thereof, is hereby acknowledged.

AMOS L. TAYLOR,
Counsel for the Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 802.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
PETITIONER,
v.
YORK & WHITNEY COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

Now comes The New York Central & Hudson River Railroad Company and respectfully petitions this Court to allow and issue a writ of certiorari to require that there be certified to this Court for review and determination the cause, the record of which remains in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, numbered 79,333, wherein the petitioner is the plaintiff and the respondent is the defendant, and wherein final judgment has been entered under a decision of the Supreme Judicial Court for the said Commonwealth, reported in vol. 230, Massachusetts Reports, p. 206.

This action was brought by the petitioner in the said Superior Court for the County of Suffolk to recover balances of freight and refrigeration charges on nine

interstate shipments of produce consigned to the respondent, moving under through bills of lading issued by the respective carriers at the points of origin under the Carmack amendment. The petitioner is a common carrier engaged in interstate commerce, and is subject to the Act to Regulate Commerce.

The shipments consisted of six carloads of cantaloupes originating at Payette, Idaho, in 1911; one carload of pie-plant originating at Chicago in 1912, and two carloads of peaches originating at Hamlin, New York, in 1912, all moving over the petitioner's railroad into Boston, Massachusetts, and there delivered in due course by the petitioner to the respondent. All the charges sued for arose by reason of errors of connecting carriers of the petitioner in failing to state on the railroad waybills proper charges based on the rates prescribed by the duly filed tariffs of the carriers (Record, pp. 24, 30, 31). The petitioner, as terminal carrier, relying on the waybills, originally collected of the respondent the wrong charges, which were less than those prescribed by the tariffs, but on discovery of the errors brought this suit to collect the balances due under the tariffs.

The plaintiff recovered a judgment in full for all the charges, except those on the first shipment of cantaloupes. The charges sought on this shipment were in the sum of one hundred and eight dollars and forty-nine cents ($108.49), as set forth in the first item of the account annexed to the plaintiff's declaration (Record, p. 14). It is for a determination of the cause so far, and only so far, as it relates to the said first item that the petitioner desires this writ.

The bill of lading covering this shipment was in the

form prescribed by the duly filed classification of the carriers (Record, p. 24). The defendant was named in the bill of lading as consignee. The bill of lading contained the following provision:

> "SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery" (Record, p. 43).

The defendant paid the freight bill as originally presented, handled the produce as commission merchant, and accounted to the shipper for the proceeds of sale, before the plaintiff demanded of the defendant the balance of the charges (Record, p. 30).

The defendant notified the plaintiff, just before delivery of the cantaloupes, that the defendant was not the owner, but was receiving them in its capacity as commission merchant and as agent for the shipper. The shipper was an association of fruit growers, without capital, which ceased to do business shortly after making this shipment (Record, p. 29).

The case was tried before a jury on an agreed statement of facts from which all proper inferences might be drawn (Record, pp. 1, 21, 37). After the parties had rested, the plaintiff duly moved that a verdict be ordered for the plaintiff for the full amount claimed in its declaration, on the ground that, under the Interstate Commerce Act and the standard interstate bills of lading, the defendant on the agreed facts was bound as a matter of law to pay all the charges claimed. The plaintiff also requested the trial Court to make such rulings (Record, p. 5). The trial Court refused and submitted questions to the jury over the exception of

the plaintiff (Record, p. 1). After the answers of the jury had been received, the court ordered a verdict for the plaintiff on all the items in the account annexed, except the first, but ruled that the plaintiff could not recover on the first item (Record, p. 13).

The whole case was taken on report to the Supreme Judicial Court for the Commonwealth. The petitioner in that Court again asserted its right to recover under the Federal Act and the interstate bill of lading. The rulings of the trial Court, however, were upheld by the Supreme Judicial Court and judgment ordered entered on the verdict obtained in the Superior Court.

All the charges for which the plaintiff obtained judgment against the respondent are the subject of a separate petition to this Court for a writ of certiorari, filed by the respondent, York & Whitney Company.

The reasons relied on by this petitioner for the allowance of the writ are as follows:

I.

The Massachusetts Supreme Judicial Court, in denying to the plaintiff the right to recover on the first item in the account annexed to its declaration, holds that a consignee who receives interstate produce as commission merchant, and so notifies the delivering carrier, is not liable to pay the full tariff charges unless disclosed to the consignee at the time of delivery. This is in conflict with the Act to Regulate Commerce as amended, as construed by this Court, providing that no carrier shall charge or collect a less or different compensation for interstate transportation than the rates specified in their filed tariffs, and that no carrier

shall refund or remit in any manner or by any devise any portion of the rates and charges so specified, nor extend to any person any privileges in transportation except as specified in such tariffs.

II.

The decision holds that it is lawful for a carrier to charge and a consignee to pay for the transportation of goods in interstate commerce a rate which is less than the rate prescribed by the duly filed tariffs. This is in conflict with the Elkins Act and the Act to Regulate Commerce, as construed by this Court, prohibiting discrimination and the giving or receiving of any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce whereby such property shall be transported at a less rate than that named in the tariffs.

III.

The decision in effect holds that it is lawful to waive the provisions of the interstate bill of lading, issued under the Carmack amendment and constituting a part of the duly filed classification of the carriers, providing that the owner or consignee shall pay the freight and all other lawful charges on the property transported. This is in conflict with the Act to Regulate Commerce, as amended, as construed by this Court.

IV.

The decision holds that it is lawful for a consignee accepting an interstate shipment under such a bill of lading to make with the carrier a special agreement

with respect to the payment of freight charges, contrary to the provisions of the bill of lading and the duly filed classifications and tariffs. This is in conflict with the Act to Regulate Commerce, as amended, as construed by this Court.

V.

The decision holds in effect that the public is not charged with knowledge of the provisions of the duly filed classifications and tariffs of interstate carriers, and that such tariffs and classifications have not the binding force of statute. This is in conflict with the Act to Regulate Commerce, as amended, as construed by this Court.

VI.

The decision of the Massachusetts Supreme Judicial Court, which appears to be in conflict with other decisions of State Courts and with the decisions of this Court, leaves carriers and consignees in doubt as to their duty with respect to the collection and payment of undercharges arising on the great volume of freight consigned to commission merchants. Many cases of this sort will arise hereafter. This is a test case the determination of which by this Court will govern the conduct of carriers and the public.

W. L. PARSONS,
Counsel for
THE NEW YORK CENTRAL &
HUDSON RIVER RAILROAD COMPANY.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 802.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
PETITIONER,
v.
YORK & WHITNEY COMPANY,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certiorari accompanies a writ of error in the case of *The New York Central & Hudson River Railroad Company, Plaintiff in Error,* v. *York & Whitney Company,* and is filed for the purpose of obtaining a review in the event this Court should hold that the case was not properly before the Court on the writ of error.

A.

AUTHORITY FOR THE ISSUANCE OF THE WRIT.

This case involves the collection of transportation charges on an interstate shipment, moving under the standard interstate bill of lading issued under the provisions of the Carmack amendment. The petitioner

claims the right to recover under the Federal statute. A Federal question is presented.

Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. *Fink*, 250 U.S. 577, 581.
Georgia, Florida & Alabama Ry. v. *Blish Milling Co.*, 241 U.S. 190, 195.
Gulf, Colorado & Santa Fe Ry. v. *Texas Packing Co.*, 244 U.S. 31, 34.
Cincinnati, New Orleans & Texas Pacific Ry. v. *Rankin*, 241 U.S. 319, 326, 327.
Southern Express Co. v. *Byers*, 240 U.S. 612, 614.
Cleveland, Cincinnati, Chicago & St. Louis Ry. v. *Dettlebach*, 239 U.S. 588, 593.

The petitioner especially claimed the right to recover under the Federal Act, both in the trial Court and the Supreme Judicial Court of Massachusetts. The petitioner moved the trial Court to order a verdict in its favor, and requested that Court to rule that the plaintiff was entitled to a verdict under the Interstate Commerce Act (Record, p. 5), duly excepting to the ruling of the trial Court that nothing in the Interstate Commerce Act and published tariffs required the entry of judgment for the plaintiff (Record, pp. 11, 13). Again, before the Supreme Judicial Court the petitioner asserted the same right, and that Court actually considered and determined the Federal question, as appears from its opinion (230 Mass. 206), a copy of which is included in the transcript of the record.

Haire v. *Rice*, 204 U.S. 291, 299.
Rothschild v. *Knight*, 184 U.S. 334.

St. Louis, Iron Mountain & Southern Ry. v. *Starbird*, 243 U.S. 592.

Missouri, Kansas & Texas Ry. v. *Elliott*, 184 U.S. 530, 534.

If this Court should hold that in this case there was not drawn in question "the validity of a treaty or statute of, or an authority exercised under the United States," and that the cause is not properly before the Court on the writ of error, then a review may be had on a writ of certiorari, on the ground that the decision of the State Court was against the Federal right claimed by the petitioner under the Interstate Commerce Act, and the petition may be allowed under section 237 of the Judicial Code; Act September 6, 1916, c. 448; 39 Stat. 726.

Southern Pacific Co. v. *Industrial Accident Commission*, 251 U.S. 259.

New York Central Railroad Co. v. *Goldberg*, 250 U.S. 85.

Texas & Pacific Ry. v. *Leatherwood*, 250 U.S. 478.

Postal Telegraph-Cable Co. v. *Warren-Godwin Lumber Co.*, 251 U.S. 27.

B.

THE STATE COURT ERRED IN HOLDING THAT THE PLAINTIFF COULD NOT RECOVER.

1. *The Interstate Commerce Act.*

The tariff rates are the only rates which the carrier may lawfully receive or the person liable properly pay.

The carrier may not depart to any extent from the published schedule of rates.

Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra.*

Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94.

Dayton Coal & Iron Co. v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 239 U.S. 446.

Louisville & Nashville R.R. v. *Mottley*, 219 U.S. 467.

The public is charged with knowledge of the lawful published rate. Misstatement of the rate, whether intentional or accidental, will not bind the carrier. The person liable for the transportation charges must pay the full rate.

Kansas City Southern Ry. v. *Carl*, 227 U.S. 639, 653.

Texas & Pacific Ry. v. *Mugg*, 202 U.S. 242.

Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184, 197.

The State Court held that the provisions of the Federal law as to rates did not apply in this case, because the defendant notified the plaintiff that the defendant was not the owner of the goods, but was receiving them as commission merchant and as agent for the shippers.

Under the provisions of the Interstate Commerce Act, the defendant became bound under the circumstances to pay the full charges. In spite of its notice to the carrier, the defendant voluntarily took delivery of the shipment. It did in fact undertake to pay the

charges for transportation, and did pay the amount demanded by the carrier. It paid a less amount than the tariff rate because of a mutual mistake. Both parties supposed the full lawful rate was being paid. The plaintiff had a lien on the goods for the full tariff charges. It was unlawful for the carrier, upon delivery of the merchandise, to depart from the tariffs and to receive compensation less than the sum fixed by the filed schedule of rates. The defendant, undertaking to pay the charges, was presumed to have knowledge of the tariff rate and to know that under the law it was the only lawful rate.

> "The transaction in the light of the act amounted to an assumption on the part of [the defendant] to pay the only legal rate the carrier had the right to charge or the consignee the right to pay."
>
> *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Fink, supra,* 582.

The State Court held that the defendant had made "a special agreement to pay only the amount demanded." Special agreements contrary to tariff provisions are forbidden under the Interstate Commerce Act.

> *Atchison, Topeka & Santa Fe Ry.* v. *Robinson,* 233 U.S. 173, 181.
>
> *Chicago & Alton R.R.* v. *Kirby,* 255 U.S. 155.
>
> *Armour Packing Co.* v. *United States,* 209 U.S. 56, 81.
>
> *Louisville & Nashville R.R.* v. *Mottley, supra,* 479.

2. *The Interstate Bill of Lading.*

The bill of lading covering the merchandise, issued under the provisions of the Carmack amendment, contained the following:

> "SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery" (Record, p. 43).

The State Court, in denying to the plaintiffs the right to recover under this clause, bases its decision on the proposition that the defendant "cannot be presumed to know the terms of the bill of lading" (Opinion of Supreme Judicial Court, p. 9).

The bill of lading was in the standard form approved by the Interstate Commerce Commission. It was included as a part of the schedule containing the classification of freight in force and applicable, and was duly published and filed with the Interstate Commerce Commission, as required by law (Record, p. 24). It has been repeatedly held that the public, including shippers and consignees, are charged with knowledge, not only of the rates prescribed by the filed tariffs, but also of the rules, regulations, and bill of lading provisions which are duly filed.

> *Chicago & Alton R.R.* v. *Kirby, supra,* 166.
> *Boston & Maine R.R.* v. *Hooker,* 233 U.S. 97.
> *Erie R.R.* v. *Stone,* 244 U.S. 332.
> *Metz Co.* v. *Boston & Maine R.R.,* 227 Mass. 307.

The defendant was named as consignee in the bill of lading, without any designation of its agency (Record,

p. 41). The defendant had actual notice that it was the consignee. It could not accept the produce and impose the condition that it pay a part only of the lawful charges, in derogation of the provision in the bill of lading that it would be responsible for the full charges.

To hold that the defendant is not liable to pay the full lawful rate is equivalent to holding that the consignee and the carrier may waive the provision of the bill of lading. Such a waiver of bill of lading provisions, duly published and filed, is strictly forbidden.

Texas & Pacific Ry. v. *Leatherwood, supra.*
Missouri, Kansas & Texas Ry. v. *Ward,* 244 U.S. 383.
Metz Co. v. *Boston & Maine R.R., supra.*
Georgia, Florida & Alabama Ry. v. *Blish Milling Co., supra.*
Erie R.R. v. *Stone, supra.*
Southern Ry. v. *Prescott,* 240 U.S. 632.

3. *Discrimination.*

Produce dealers throughout the country consign produce to commission merchants at Boston (Record, p. 35). Railroads are required to transport numerous shipments from associations of indefinite or unknown owners, from whom recovery of undercharges would be uncertain, if not impossible. The shipment here involved was from an association of fruit growers, without capital, which ceased to do business shortly after making the shipment (Record, p. 29). Carriers receiving for transportation such shipments, with no notice at the time of shipment that the consignee is

agent for the shipper, rely on recovering full charges from the bill of lading consignee at destination. If the consignee, after the transportation is completed, may escape responsibility for undercharges by notifying the terminal carrier that the consignee is receiving the commodity as a commission merchant, then in numerous instances the full tariff charges cannot be collected. Unlawful discrimination will result.

Respectfully submitted,
W. L. PARSONS,
Counsel for
THE NEW YORK CENTRAL &
HUDSON RIVER RAILROAD COMPANY,
Petitioner.

Supreme Court, U. S.
FILED
SEP 18 1909
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1909.

No. 231

YORK & WHITNEY COMPANY,

Petitioner,

v.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari and Brief for Petitioner in Support Thereof.

ALFRED L. TAYLOR,
ADAMS & TAYLOR,
Counsel for Petitioner.

ARGUS PRINTING & PUB. CO., LAS VEGAS, NEVADA.

INDEX.

	Page.
NOTICE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI	1
ACKNOWLEDGMENT OF NOTICE	2
PETITION FOR WRIT OF CERTIORARI	3
BRIEF IN SUPPORT OF THE PETITION	15
Statement of the case	15
Jurisdiction	16
The issues raised	17
Argument	18
I. There was no agreement, express or implied, whereby the petitioner became liable to pay any of the under or subsequent charges declared on in this case	18
1. Fundamental ruling right	18
2. Application of fundamental ruling erroneously made	18
3. Petitioner not liable as shipper or owner	19
4. Petitioner not liable under any bills of lading	19
5. No evidence that carrier looked to petitioner for established tariff rates	20
6. Custom of the trade binding on carrier	21
7. Past dealings between the parties significant	21
8. Leading case governing (opinion by Mr. Justice Pitney in New Jersey Court)	21
9. As to the lien	23

Page.

10. Liability does not turn upon knowledge of established rates 23
11. As to icing charges 24
II. The respondent is estopped from maintaining this action 25
III. Even if the respondent is entitled to recover then the petitioner is entitled to recoup against the respondent the full amount so recovered 27
IV. Public interests demand the issuance of the writ 28

CASES, STATUTES, AND AUTHORITIES CITED.

Birdsey v. Butterfield, 34 Wis. 52 27
Blanchard v. Page, 8 Gray, 281, 295 20
Boston & Maine R.R. v. Whitcher, 1 Allen, 497, 498 20
Central of Georgia Ry. v. Southern Ferro Concrete Co., 193 Ala. 108 24
Central R.R. Co. v. MacCartney, 68 N.J. 165, pp. 173, 175 (39 Vroom, 165) 21, 24, 26
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Rudy, 173 Ind. 181 27
Coleman v. Lewis, 183 Mass. 485 27
Cornelius & Co. v. Central of Georgia Ry., 13 Ala. App. 533 28
Corpus Juris, vol. 10, pp. 445, 446, and cases cited 20
Cox v. Central Vermont R.R., 170 Mass. 129, 136 20
Deans v. Eldredge, 217 Mass. 583, 588 25
Ewart on Estoppel, p. 77 26
Gulf, Colorado & Santa Fé Ry. Co. v. Hefley, 158 U.S. 98 23

	Page.
Hutchins on Carriers [3d ed.], sec. 807	20
I.C.C. Rep. vol. 14, pp. 346-349	19
Judicial Code, sec. 237, Act of September 6, 1916, c. 448, 39 Stat. 726	17
Kilgore v. Bruce, 166 Mass. 136	27
Lufburrow v. Henderson, 30 Ga. 482	27
New Orleans & Northeastern R.R. Co. v. Scarlet, 249 U.S. 528	16
New York Central & Hudson River R.R. Co. v. York & Whitney Co., 230 Mass. 206	15, 28
N.Y., N.H. & H. R.R. Co. v. York & Whitney Co., 215 Mass. 36	28
Old Colony R.R. Co. v. Wilder, 137 Mass. 536	20
Pa. R.R. v. Titus, 216 N.Y. 17	28
Phila. & Reading R.R. v. Baer, 56 Pa. Sup. 307	28
Pomeroy on Eq. Jur. [3d ed.], p. 1439	27
Rogers v. Humphrey, 39 Me. 382	27
Sears v. Wingate, 3 Allen, 103	27
St. L., Iron Mt. & Southern Ry. Co. v. McWhirter, 229 U.S. 265, at 277	16
St. L., Iron Mt. & Southern Ry. Co. v. Taylor, 210 U.S. 281	16
St. L., Iron Mt. & Southern Ry. Co. v. Starbird, 243 U.S. 592, 601	16
Story's Eq. Jur. vol. 1, p. 207, and note	27
Tirrell v. Gage, 4 Allen, 245, 253	20
Utermehle v. Norment, 197 U.S. 40, 56, and cases cited	26
Wooster v. Tarr, 8 Allen, 270	23
Yazoo & Miss. Valley R.R. Co. v. Mullins, 249 U.S. 531	16

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 803.

YORK & WHITNEY COMPANY,
PETITIONER,
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

NOTICE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To WILLIAM L. PARSONS, ESQ., Counsel for the Respondent:

Please take notice that on Monday, April 19, 1920, at the coming in of the Court, or as soon thereafter as may be, the petitioner will submit to the Supreme Court of the United States, at Washington, D.C., its petition for writ of certiorari, together with a copy of the record below. A printed copy of the petition and of the brief to be submitted in support thereof are herewith delivered to and served upon you.

AMOS L. TAYLOR,
Counsel for the Petitioner.

ACKNOWLEDGMENT OF NOTICE.

Due service of the foregoing notice, together with a copy of said petition and of the brief in support thereof, is hereby acknowledged and all further notice waived.

W. L. PARSONS,
Counsel for the Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 803.

YORK & WHITNEY COMPANY,
PETITIONER,

v.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

Your petitioner, York & Whitney Company, a Massachusetts corporation, respectfully petitions that this Court issue a writ of certiorari to the Superior Court for the Commonwealth of Massachusetts to remove therefrom for review and determination by this Court the case in said Superior Court for the County of Suffolk, No. 79,333, wherein your petitioner is defendant and this respondent is plaintiff and wherein final judgment was entered on December 18, 1919, after a report by said Superior Court to the Supreme Judicial Court for said Commonwealth and its decision (reported in 230 Mass. 206) and rescript to said Superior Court to enter such final judgment.

The respondent is a common carrier engaged in interstate commerce, and the petitioner is a commission merchant dealing in fruits and produce at Boston, Massachusetts. The action was brought to recover balance of freight and refrigeration charges on nine different consignments in interstate commerce, after the petitioner had paid the amount demanded at or before delivery, sold the produce, remitted the balance to the shipper, and thereafter having no funds of the respective shippers.

The first six items represented six carloads of cantaloupe shipped from Payette, Idaho, in 1911, the seventh item one carload of pie-plant from Chicago in 1912, and the eighth and ninth items two carloads of peaches from Hamlin, New York, in 1912. The Supreme Judicial Court held that the respondent was not entitled to collect on the first item, but judgment was ordered for it on the remaining eight items, and the decision involved the construction of the Interstate Commerce Act, so called, and its amendments and additions. The respondent has filed a cross-petition for a similar writ with reference to the judgment against it on the first item.

The case was tried on an agreed statement of facts and the original bills of lading and paid freight bills (record, pp. 21-37).

The six cars of cantaloupe were shipped under straight bills of lading from the owner, consigned to Boston, but waybilled to Chicago, where the waybills were changed to Boston. The petitioner first learned by wire from Chicago (record, p. 35) that they were coming, and immediately, on September 11, 1911, inquired of the respondent by letter the correct tariff

(record, p. 25). A reply was received on September 15, 1911 (record, p. 2). The first car arrived September 11, 1911. The petitioner's clerk and director in charge of its consignments, by telephone inquired of the respondent's freight agent at Kneeland Street yard, at Boston, under whose direction all freight is delivered and all bills rendered, for the freight charges on the cantaloupe, informed the freight office "that the six cars which were expected were commission goods and that he [petitioner] wished to know what the charges would be before it decided to accept the consignment." He was informed that the respondent had no bill as yet for this shipment, that no one knew the charges, and that the petitioner would be notified. Later, on the same day, by telephone from the same office, the petitioner was informed that the charge per car on the consignment was $222.20. Thereafter, on the same day, the petitioner accepted delivery of the first car and received and paid the bill for the charges as disclosed (record, p. 22), which bill was receipted (record, p. 38). The petitioner's agent had been in the habit of calling said freight office for twenty years for charges for expected consignments and other details and the petitioner had acted upon information so received, and this had been the custom generally in the fruit and produce business at Boston for many years (record, p. 23).

The other five cars arrived after the petitioner had received a letter stating the correct rate, but delivery check for each car at or before delivery was delivered to the petitioner, showing the charges as per the first bill, and bills were immediately issued, paid (record, p. 23), and receipted (record, p. 38 *et seq.*).

There was a profit on the first car, which was remitted to the shipper within two days. There was a loss on the other five cars (record, pp. 28-29).

On October 15, 1911, the respondent first notified the petitioner that an error had been made, and rendered bills for alleged balances, being $108.49 for the first car and $641.11 for the other five cars (record, p. 30). On receiving these supplemental bills the petitioner had no funds of the shipper in its hands. The bills of lading never came to the possession or knowledge of the petitioner before suit was brought.

The seventh item is an icing charge of one and 25/100 (1.25) dollars for ice furnished for a car of pie-plant at Karners, New York, shipped from Chicago to Boston (record, pp. 15, 31, 32). The car was iced at Chicago, Detroit, and Suspension Bridge, for which charges were paid. On arrival at Boston, and before removal by the petitioner, it received a delivery check showing freight and icing charges, but no icing charge at Karners. The petitioner had no knowledge that the car was iced there and did not suspect that it would be iced more than twice. It immediately paid the amount of charges as rendered, sold the pie-plant, remitted the net balance, and thereafter received this supplemental bill, then having no funds of the shipper in its hands. The bill of lading covering this shipment never came to the possession or knowledge of the petitioner before suit (record, p. 32).

The eighth and ninth items are for icing charges of five (5) dollars each for ice furnished for two cars of peaches shipped from Hamlin, New York, to Boston (record, pp. 16, 32, 33, 34). The cars were iced at the starting point and again at West Albany and at Char-

lotte, New York, for which charges were made. On arrival at Boston, and before removal by the petitioner, it received a delivery check for each car showing the freight and the first two icing charges (which were paid), but no icing charge at Charlotte. The petitioner had no knowledge that the cars were iced there and did not suspect that they would be iced more than twice. It immediately paid the amount of charges as rendered, sold the peaches, remitted the net balance, and thereafter received these supplemental bills, then having no funds of the shipper in its hands. The bills of lading covering these shipments never came to the possession or knowledge of the petitioner before suit (record, pp. 33, 34).

The petitioner at the several times of shipment and delivery was a dealer in fruit and produce at Boston. A large portion of its business it handled as commission merchants, all of which was known to the respondent when said consignments were delivered, and these facts were also known to the agents of the other lines over which said freight moved. The petitioner was in no way interested in any of the produce except as commission merchant for the shippers to sell the same, for which it is entitled to a commission. The respondent was notified before delivery that the six cars of cantaloupe were so consigned, but such information was not expressly communicated as to the pie-plant and peaches before delivery (record, p. 35).

Produce dealers throughout the country consign and ship to the petitioner and other produce dealers at Boston produce for sale on commission. It receives such from persons entirely unknown to it and the shipper of the melons was entirely unknown to it (record, p. 35).

All such produce was perishable property and required an immediate sale to avoid loss, and it is a custom among such dealers at Boston immediately to sell goods so consigned at the best market price and to remit the amount received to the consignor after deducting all known charges, and a successful conduct of the commission business requires immediate remittances (record, p. 35).

The procedure followed in each of these shipments was in conformity to a custom between the petitioner, the respondent, and its predecessor, the Boston & Albany Railroad, for many years. The custom had been where there were no funds of the shipper on hand to return such supplemental bills with information as to the identity, locality, and responsibility of the shipper, and no suit had ever been brought therefor against the petitioner until this suit (record, pp. 35, 36).

Prior to 1911 the respondent requested the petitioner, by written contract, to be placed upon its weekly credit list and to agree to pay the respondent all lawful charges for freight and other incidental expenses upon goods consigned to it at Boston. The petitioner declined to execute such contract and informed the respondent that often the petitioner refused to accept consignments of highly perishable property where the condition of the goods, state of the market, responsibility of the shipper or any of them were not satisfactory to it. From such time to the time of suit the respondent allowed the petitioner to accept goods without paying charges in advance, but issued delivery check before delivery showing charges thereon, rendered a bill on the same day for the amount shown

thereon, which has been paid immediately (record, p. 36).

The tariffs governing the several shipments were voluminous. It is difficult for one not familiar with such schedules to ascertain the proper charges. The respondent and the initial carriers employed men who were experts in such matters. The petitioner had no actual knowledge of the tariff rates except such as it received from the respondent, and no knowledge whatever of the icing charges, and in accepting the shipments and paying charges as disclosed it relied upon the amount which it was to pay as being correct (record, p. 37).

When the several consignments were delivered to the petitioner nothing was said about paying the freight and other charges, and the petitioner did not agree to pay any charges at the time not disclosed to it except and unless as set forth in the agreed statement of facts (record, p. 36). All proper inferences of fact may be drawn (record, p. 37).

The case was tried before the Superior Court with a jury. The Court, over the objection of both parties and notwithstanding the agreed statement of facts, framed and submitted to the jury certain issues. By their answers the jury found that the petitioner accepted the first car of cantaloupe with the understanding that the respondent did not look to it for all lawful charges, that it did not impliedly agree to pay the same, and that the respondent was estopped from maintaining the action thereon (record, pp. 2-4).

By other answers the jury found exactly the opposite on all the other eight items (record, pp. 2-4). The Court thereupon ordered verdicts to be entered for the

petitioner as to the first item and for the respondent as to all the others, and reported the case to the Supreme Judicial Court (record, p. 13), which sent back a rescript of "Judgment for Plaintiff on the Verdict."

By motions for verdict in its favor generally and upon each item separately at appropriate times (record, pp. 1, 5), by objection and exception to the submission of such issues (record, p. 1), by motion to set aside answers to those issues and that such issues be discharged (record, pp. 12, 13,) and by numerous requests for rulings (record, pp. 6-12, both inclusive), the petitioner asserted its contention to a judgment for it on all items, at all stages raising the Federal question.

Your petitioner relies on the following reasons for the issuance of such writ:

1. The Court erred in so construing the Interstate Commerce Act as to hold, in substance, that it was bound by that Act to find that the petitioner, a commission merchant and neither the shipper nor the owner of the merchandise in question, under "straight bills" of lading which never came to its knowledge, could not legally have entered into a contract with the respondent for the delivery of the merchandise in question to the petitioner upon the payment of a less amount than the freight charges fixed in accordance with such Act, where the petitioner had actual information of the correct tariff charges at or prior to delivery.

2. The Court erred in so construing the Interstate Commerce Act as to hold that it was bound by that Act to find that the respondent was not estopped to maintain the action as to all but the first item against

the petitioner, a commission merchant and neither the shipper nor the owner of the merchandise in question, under "straight bills" of lading which never came to its knowledge, for the excess of freight charges fixed by the tariffs adopted under said Act over the amount stated by the respondent to the petitioner at or before delivery.

3. The Court erred in so construing the Interstate Commerce Act as to hold that it was bound by that Act to find that the petitioner, a commission merchant and neither the shipper nor the owner of the goods in question, under straight bills of lading which never came to its knowledge or possession, was not entitled to recoup against the respondent the damages suffered by the petitioner for misrepresentation by the respondent of the amount of such charges.

4. The Court erred in holding that the petitioner, under the facts of this case and the provisions of the Interstate Commerce Act, was bound to know that the only charge which the respondent could lawfully make in so far as it concerned this petitioner was that established by the published tariffs.

5. The Court erred in deciding, in substance, that actual knowledge by the petitioner of the correct tariff rates governing the shipments of cantaloupe from Payette, Idaho, prior to the delivery, rendered the petitioner liable on items two to six, both inclusive.

6. The Court erred in holding that under the Interstate Commerce Act the petitioner as commission merchant was liable for icing charges of which it had no knowledge and no reason to suppose that the shipment had been iced other than as disclosed at or before delivery.

7. The Court erred in holding in effect that an implied promise on the part of the petitioner to pay the charges in items two to nine, both inclusive, was based upon the tariff rates fixed under the Interstate Commerce Act.

8. The Court erred in holding in effect that the Interstate Commerce Act and the tariffs established thereunder in any way affected or determined the rights of the petitioner in the decision of this case.

9. The Court erred in holding in effect that because of the Interstate Commerce Act and the established tariffs the agreement between the petitioner and the respondent as to items two to nine, both inclusive, was a general one to pay the legal tariff rates and was not a special agreement to pay only the amount disclosed at or before delivery.

10. The decision of the Supreme Judicial Court of Massachusetts is in conflict with the decisions of Courts of other states. Great confusion exists in interstate business and precise questions herein raised have never been decided by this Court. The commission merchants and factors generally are in doubt as to their rights and liabilities; that similar errors are of almost daily occurrence, and that there are now among commission merchants in Boston a large number of claims pending adjustment but awaiting the final decision of this case; that associations of commission merchants throughout the United States have become interested in the prosecution of this petition and a great multiplicity of suits will be obviated by the final determination of the issues here presented.

Wherefore your petitioner respectfully prays that writ of certiorari may be issued as hereinbefore indi-

cated, to the end that the said case may be reviewed and determined by this Court, that the judgment of said Superior Court and the decision of the said Supreme Judicial Court may be reversed by this Court, and that your petitioner may have such other and further relief as to this Court may seem appropriate.

AMOS L. TAYLOR,
ADAMS & BLINN,
Counsel for York & Whitney Company.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 803.

YORK & WHITNEY COMPANY,
PETITIONER,
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner has sued out a writ of error in this same case and this petition for writ of certiorari accompanies it. By either or both of these methods this petitioner seeks to obtain a final decision in this Court on the questions raised and decided below in *New York Central & Hudson River R.R. Co.* v. *York & Whitney Co.*, 230 Mass. 206. The respondent in this case has also sued out a writ of error and filed a cross-petition for certiorari for a review of the record below in the same case. It is numbered in this Court No. 802, October Term, 1919, and entitled *"The New York Central & Hudson River Railroad Company, Plaintiff in Error,* v. *York & Whitney Company, Defendant in Error."*

This proceeding was taken because the Court below decided part of the claims in favor of the railroad company (items two to nine, both inclusive), and part in favor of this petitioner (item one).

JURISDICTION.

Your petitioner contends that the decision against it on items two to nine, both inclusive, of the account annexed to the declaration below was made by reason of an incorrect construction given by that Court to the Interstate Commerce Act. The claim was made at every stage (and denied below) that there was no evidence tending to show liability under the Federal law. This ruling is reviewable because it inherently involves the effect and operation of the said Act.

St. L., Iron Mt. & Southern Ry. Co. v. *McWhirter*, 229 U.S. 265, at 277.
St. L., Iron Mt. & Southern Ry. Co. v. *Taylor*, 210 U.S. 281.
St. L., Iron Mt. & Southern Ry. Co. v. *Starbird*, 243 U.S. 592, 601.

It is entirely immaterial to this petitioner whether the United States Supreme Court passes upon the questions which this petitioner raises under the writ of error or by the issuance of the writ of certiorari. Both methods are now before the Court. It earnestly prays, however, that the Court will decide the questions under one method or the other.

New Orleans & Northeastern R.R. Co. v. *Scarlet*, 249 U.S. 528.
Yazoo & Miss. Valley R.R. Co. v. *Mullins*, 249 U.S. 531.

It may be fairly urged that, under section 237 of the Judicial Code, Act of September 6, 1916, chapter 448, 39 Stat. 726, below, there was drawn in question the validity of a Federal statute and the authority exercised under the United States and the decision against this petitioner was in favor of their validity; further, the petitioner contends that the transactions in question, in so far as it is concerned, were governed solely by the state laws, and the decision below is, in substance, based on the ground of such laws being repugnant to the laws of the United States and against the validity of such state laws, also that the petitioner has claimed rights, privileges, and immunities under the Federal statute and the authority exercised thereunder, namely, the right to be let alone by the Interstate Commerce Act in these transactions, and the decision is against the rights and privileges so claimed.

The Issues Raised.

The issues raised broadly are whether the petitioner's liability, as commission merchant and consignee, for undercharges and icing charges on commission consignments, is in any way determined or controlled by the Interstate Commerce Act, whether it did or did not actually know of the published tariffs, and whether the carrier did or did not know that the goods in question were commission shipments. The respondent claims the right to recover under the Federal statute; the petitioner denies it. These issues were raised by requests for rulings, motions for judgment, etc., throughout the trial (record, pp. 1, 5, 6-12, *et seq.*).

Argument.

I.

There was no agreement, express or implied, whereby the petitioner became liable to pay any of the under or subsequent charges declared on in this case.

1. Fundamental Ruling Right.

The Court below was right in holding that the Interstate Commerce Act was applicable only to those who expressly or by implication became parties to the contract of transportation, and that whether one is or has become such a party must be determined by the general principles of the common law (230 Mass. 216, 217). Under this ruling, the Court below held that your petitioner was not party to the contract in the case of the first item and ordered judgment for your petitioner.

2. Application of Fundamental Ruling Erroneously Made.

But the Court erred in holding that your petitioner was a party to the contract in the case of the other eight items, and this seems to be based on the fact that "It [your petitioner] was bound to know, also, that the only charge which the plaintiff [your respondent] lawfully could make was that established by the published tariff" (230 Mass. 219), and, further, as to the second to sixth items of cantaloupe, the fact that your petitioner actually knew the lawful rates from Payette, Idaho, to Boston before it received the consignments in question. Hence, having ruled that the principles of the common law shall govern the case, the Court below then proceeds to apply the Interstate Commerce Act

and arrive at conclusions based thereon, contrary to the common law.

3. Petitioner Not Liable as Shipper or Owner.

The petitioner was not the owner nor the shipper. Hence, the large class of cases already decided has no bearing. There was a common-law presumption of ownership in the petitioner as consignee, but this presumption was rebutted by absolute notice prior to delivery in the case of the cantaloupe and by the agreed facts at the trial as to all the items. Hence, the decision cannot be based on presumptive ownership.

4. Petitioner Not Liable Under Any Bills of Lading.

The bills of lading in all nine cases were "straight," that is, not to bearer, and your petitioner did not know that there were any bills of lading in existence, nor the terms of any such, until long after the transactions had taken place.

The Uniform Bill of Lading Act makes no difference since the uniform bill of lading is not intended to take the place of special bills issued for live stock and perishable property (14 I.C.C. Rep. 346-349). Hence the case cannot be governed by their terms, but, if it were, there is nothing in the bills of lading which affects its liability as commission merchant, not being the shipper or owner. They provided, in the alternative, that "the owner or consignee shall pay the freight," etc. It will not be presumed that the carrier did not look to the owner under general common-law principles and the Federal Act to pay the freight. There was no evidence to the contrary.

5. No Evidence that Carrier Looked to Petitioner for Established Tariff Rates.

There was no evidence to authorize the Court to hold that the petitioner received the goods in question, knowing that the respondent looked to the consignee for the lawful charges. All the evidence was in writing and is in the record (pp. 21-44). As to the cantaloupe, the respondent had been expressly told that it was a commission transaction and that it must know the charges before it decided whether to accept the consignment or not. The petitioner was informed of the charge per car. A delivery check was issued, showing this charge in every case before delivery. The fact that your petitioner also knew the published tariff rates to be greater cannot change the situation. The respondent had an absolute right to deliver the consignments without collecting anything or looking to your petitioner for anything and to rely upon the contracts with the shipper. The respondent had a lien which it could waive without any payment.

See *Old Colony R.R. Co.* v. *Wilder*, 137 Mass. 536.

Blanchard v. *Page*, 8 Gray, 281, 295.

Tirrell v. *Gage*, 4 Allen, 245, 253.

Boston & Maine R.R. v. *Whitcher*, 1 Allen, 497, 498.

Hutchins on Carriers [3d ed.], sec. 807.

10 Corpus Juris, pp. 445, 446, and cases cited.

Cox v. *Central Vermont R.R.*, 170 Mass. 129, 136.

6. Custom of the Trade Binding on Carrier.

The custom of the trade among the fruit and produce dealers at Boston, Massachusetts, actually known to the respondent, set forth in the petition and in the record, is very important; that is, to sell commission goods immediately at the best market price and remit the net amount to the consignor after deducting all known charges, and a successful conduct of the commission business requires immediate remittances (record, p. 35). For many years, where the petitioner had settled with its principal for commission goods and undercharges were afterwards discovered, no suit had ever been brought by the respondent, who had been referred to the shipper for collection (record, pp. 35, 36).

7. Past Dealings between the Parties Significant.

Prior to 1911 the respondent requested the petitioner to be placed upon its weekly credit list and to agree to pay all lawful charges of freight, etc. The petitioner declined, informing the respondent that it often refused to accept highly perishable property where the condition of the goods, state of the market, responsibility of the shipper, or any of them, were not satisfactory. Since then delivery checks were issued showing charges and bills rendered and paid the same day (record, p. 36).

8. Leading Case Governing.

Mr. Justice Pitney, in—

Central R.R. Co. v. *MacCartney*, 68 N.J. 165 (39 Vroom, 165),

lays down the rules of law applicable to this transaction, on page 173, as follows:

> "Where one accepts delivery of goods from a common carrier, receiving at the same time a statement plainly setting forth the amount of freight charges thereon, with knowledge that the carrier is giving up for the benefit of the consignee a lien upon the goods for the amounts so stated, such conduct by the consignee is, of course, cogent evidence, and, standing unexplained and uncontradicted, is sufficient evidence of an implied promise to pay the stated amount of the charges.
>
> "Such an undertaking was undoubtedly made by the defendants in this case. That undertaking has been performed by them, but we fail to see in the facts as certified to us by trial court, anything to support a finding that the defendant, by anything that transpired at or after the delivery of the ties, understood and promised to pay freight charges indefinite in amount, or any sum beyond that which was stated on the bills as rendered.
>
> "If the plaintiff, the railroad company, instead of waiving its lien had insisted upon retaining the ties until payment of the freight, at the same time rendering to the defendants the freight bills, as, in fact, they were rendered, and if the defendants had thereupon paid the bills in order to secure the ties, could a further liability be imposed upon them simply on the ground that the bills as rendered did not include either charges? We think not. In such case the plaintiff would have been left to its action against the consignor as the party on whose engagement service was performed."

9. As to the Lien.

The only right the respondent had against the petitioner was to hold the goods until the lien was discharged. The possible extent of the lien is the lawful charges.

See *Gulf, Colorado & Santa Fé Ry. Co.* v. *Hefley*, 158 U.S. 98.

It does not follow that the respondent was bound to enforce its lien. Waiver of the lien does not relieve the shipper.

Wooster v. *Tarr*, 8 Allen, 270.

Nothing in the Interstate Commerce Act prevents this so long as the shipper or the owner or both are liable for the lawful amount. The purpose of the Interstate Commerce Act was to insure equality as to freight rates, but not to change the class of persons or the rules of the state laws determining who might be liable. Hence, the Interstate Commerce Act affects only the primary liability for freight charges and has no bearing upon the liability which the consignee may incur by implication by acceptance of the goods.

10. Liability Does Not Turn upon Knowledge of Established Rates.

The Massachusetts Court seems to base its decision of no liability for the first item on the fact that the petitioner did not actually know the established rates before delivery, while it was liable for the next five items because it did actually know them before delivery. The Federal Act provides that the published tariffs are notice to all the world. Legally, the petitioner

did know the rates. The contract to pay between the petitioner and the respondent, if any, was a special one to pay what was demanded (230 Mass. 218). Knowledge of the established rate has no bearing. Nothing might have been demanded.

Central of Georgia Ry. v. *Southern Ferro Concrete Co.*, 193 Ala. 108.
Central R.R. Co. v. *MacCartney, supra.*

The Massachusetts Court held in substance that the petitioner was liable for the tariff on the cantaloupe after it had received actual knowledge of the established rates, and not before. This was error.

11. As to Icing Charges.

Items seven, eight, and nine are for icing charges. The petitioner was given delivery slips showing the charges, including the usual icing charges, before delivery, which were paid. The petitioner had no knowledge of the charges in question and no reason to suspect that the cars would be iced more than as disclosed by the bills rendered. As above seen, the petitioner must know all charges it is to pay before delivery, in order to decide whether to accept delivery or not. There is no way on earth for the petitioner or any one else, apparently, to tell what icing charges may exist. There is no tariff which prescribes how often nor where the goods shall be iced. It is a matter of judgment. They may be iced more than is necessary. The shipper makes a hard and fast contract to pay whatever icing charges may be incurred. There is a stronger reason here why the consignee should not impliedly agree to pay what he cannot surmise even ex-

ists. Further, as the goods are highly perishable, the carrier always desires their acceptance by the consignee to avoid a public sale to collect its charges, as the goods cannot be returned. The implied contract found by the Court below to exist to pay these charges has no basis in fact or in law. The state Court apparently, by virtue of the Interstate Commerce Act, puts the consignee in the shoes of the shipper in the absence of special and accurate knowledge by the consignee of the published tariff and the actual icing charges, which latter, in fact, cannot be ascertained sometimes for days afterwards. Further, the Court below laid stress on the fact that the respondent had no actual knowledge that this was a commission transaction, stating (230 Mass. 223): "Under those conditions, the plaintiff [respondent] had the right, as a matter of law, to regard and deal with the consignee [petitioner] as the owner. . . ." This was not the rule of the common law, since the cases have held, as above, that there was only a presumption of ownership and this presumption was completely rebutted at the trial. This modification of the common law was based on the Interstate Commerce Act and was error.

II.

The respondent is estopped from maintaining this action.

The defense of estoppel is recognized in Massachusetts "where one's conduct is such as to induce another to change his situation."

Deans v. *Eldredge*, 217 Mass. 583, 588.

Here, again—

Central R.R. Co. v. *MacCartney*, 68 N.J. 165, at 175—

is the leading case applicable to these facts.

The respondent, by issuing delivery checks and otherwise, told the petitioner what it expected the petitioner to pay. The respondent undertook to state what the petitioner must pay to get delivery. This information was demanded of the petitioner before deciding to accept and it relied upon this information. The respondent knew that the petitioner intended to act and rely upon such information. The petitioner was ignorant of the tariff charges on the first car of cantaloupe and of all the icing charges. Actual knowledge, however, was not important, as above seen. The important thing was, what must the petitioner pay to get possession, and could it sell the consignments on the market at a price sufficient to pay all expenses and its commission? The petitioner acted in good faith, and if it has to pay these under and icing charges, it will be seriously damaged by the representations of the respondent. It has no funds in its hands belonging to the owners. The elements of estoppel are complete.

The representation was one of fact, *i.e.*, what the petitioner must pay. But if it was not one of fact, but rather one of law, the result is the same, since a mistake of law may be the basis for an estoppel, especially where there has been a misrepresentation. See—

Utermehle v. *Norment*, 197 U.S. 40, 56, and cases cited.

Ewart on Estoppel, p. 77.

Pomeroy on Eq. Jur. [3d ed.], p. 1439.
Story's Eq. Jur. vol. 1, p. 207, and note.

There is nothing in the Interstate Commerce Act which prevents the state Court from finding that the respondent was estopped to maintain this action.

The state Court decided in substance that, because of the Federal Act and published tariffs, there was no estoppel. This was error.

III.

Even if the respondent is entitled to recover, then the petitioner is entitled to recoup against the respondent the full amount so recovered.

The basis of the claim for recoupment is that the petitioner suffered damages by representations of the respondent as to the charges which the respondent expected to collect from the petitioner. These representations are now denied and have become misrepresentations, whether as to fact or law is unimportant. This doctrine is well settled in Massachusetts. See—

Sears v. *Wingate*, 3 Allen, 103.
Kilgore v. *Bruce*, 166 Mass. 136.
Coleman v. *Lewis*, 183 Mass. 485.
Lufburrow v. *Henderson*, 30 Ga. 482.
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. *Rudy*, 173 Ind. 181.
Rogers v. *Humphrey*, 39 Me. 382.
Birdsey v. *Butterfield*, 34 Wis. 52.

There is nothing in the Interstate Commerce Act which renders this doctrine inoperative. The state Court decided, in substance, that, because of the pub-

lished tariffs and the Federal Act, there can be no recoupment. This was error.

IV.

Public Interests Demand the Issuance of the Writ.

The questions raised are of great importance. Commission merchants deal in perishable food products very largely and most of such products are handled as in this case disclosed. The precise questions here raised have not been decided by this Court. Decisions of state Courts seem to be in conflict, although perhaps not squarely in point.

Pa. R.R. v. *Titus*, 216 N.Y. 17.
Phila. & Reading R.R. v. *Baer*, 56 Pa. Sup. 307.
N.Y., N.H. & H. R.R. Co. v. *York & Whitney Co.*, 215 Mass. 36.
Cornelius & Co. v. *Central of Georgia Ry.*, 13 Ala. App. 533.
N.Y. Central & Hudson River R.R. Co. v. *York & Whitney Co.*, 230 Mass. 206.

The trade and the railroad companies throughout the country are awaiting a final decision by this Court. A great multiplicity of litigation will be avoided and different rules governing interstate shipments will thereafter cease to exist.

Respectfully submitted,
AMOS L. TAYLOR,
Counsel for York & Whitney Company.

INDEX.

	Page
Statement of the case	1
Specification of errors	11
Argument	13
I. Questions presented under the Railroad Company's specification of errors	13
A. The Interstate Commerce Act	14
B. The bill of lading	21
Interpretation	24
Consignee charged with knowledge	25
Bill-of-lading clause controls	27
C. Discrimination	28
II. Questions presented under the York & Whitney Company's specification of errors	29
A. The consignee agreed to pay the lawful rates	30
Undercharges on remaining five carloads of cantaloupes	30
Undercharges on pie-plant and peaches	33
Prior dealing between parties	37
B. Estoppel and recoupment	38
Conclusion	40

CASES CITED.

Atchison, Topeka & Santa Fe Ry. v. Robinson, 233 U.S. 173	19, 27
Berwind-White Coal Mining Co. v. Chicago & Erie R.R. Co., 235 U.S. 371	18
Boston & Maine R.R. v. Hooker, 233 U.S. 97	26
Boston & Maine R.R. v. Oceanic Steam Navigation Co., 226 Mass. 509	36

Page

Boston & Maine R.R. v. Whitcher, 1 Allen, 497 22, 36
Brown v. Bradlee, 156 Mass. 28 33
Central Railroad of New Jersey v. MacCartney, 68 N.J. Law, 165 40
Central Railroad of New Jersey v. Mauser, 241 Pa. 603 39
Chicago & Alton R.R. v. Kirby, 225 U.S. 155 19, 26, 27
Chicago & Eastern Illinois R.R. v. Collins Produce Co., 249 U.S. 186 38
Cincinnati, New Orleans & Texas Pacific Ry. v. Rankin, 241 U.S. 319 14
Cornelius & Co. v. Central of Georgia Ry., 13 Ala. App. 533 38
C., C., C. & St. L. Ry. v. Dettlebach, 239 U.S. 588 23
Davison v. City Bank, 57 N.Y. 81 23
Dayton Coal & Iron Co. v. Cincinnati, New Orleans & Texas Pac. Ry., 239 U.S. 446 16, 19
Dower v. Richards, 151 U.S. 658 31, 38
Elwell v. Skiddy, 77 N.Y. 282 32
Emerson v. Central of Georgia Railway, 196 Ala. 280 17, 35
Erie Railroad v. Stone, 244 U.S. 332 28
Frati v. Janniini, 226 Mass. 430 29
Georgia, Florida & Alabama Ry. v. Blish Milling Co., 241 U.S. 190 14, 26
Gulf, Colorado & Santa Fe Ry. v. Hefley, 158 U.S. 98 16
Gulf, Colorado & Santa Fe Ry. v. Texas Packing Co., 244 U.S. 31 14
Hecht v. Batcheller, 147 Mass. 335 30
Illinois Central R.R. v. Henderson Elevator Co., 226 U.S. 441 40

Page
Jackson, Receiver, v. Piowaty, 205 Ill. App. 329 17, 35
Kansas Southern Ry. v. Carl, 227 U.S. 639 16, 19
Louisiana Railway & Navigation Co. v. Holly, 127 La. 615 17, 18, 39
Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 15, 19, 26, 33
Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 16
Metz Co. v. Boston & Maine R.R., 227 Mass. 307 27
Missouri, Kansas & Texas Ry. v. Ward, 244 U.S. 383 27
New York, New Haven & Hartford R.R. Co. v. I.C.C., 200 U.S. 361. 37
New York, New Haven & Hartford R.R. Co. v. Sampson, 222 Mass. 311 36
New York, New Haven & Hartford R.R. Co. v. York & Whitney Co., 215 Mass. 36 16, 17, 25, 35, 39
Northern Pacific Ry. v. Wall, 241 U.S. 87 27
Old Colony Railroad v. Wilder, 137 Mass. 536 23, 30, 36
Pennsylvania R.R. v. International Coal Co., 230 U.S. 184 16
Pennsylvania R.R. v. Titus, 216 N.Y. 17 17, 22, 25, 35, 39
Pennsylvania R.R. v. Titus, 156 App. Div. N.Y. 830 40
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577 14, 15, 16, 17, 19, 21, 33, 35, 39
Singer v. Merchants Despatch Transportation Co., 191 Mass. 449 35
Southern Pacific Co. v. Industrial Accident Commission, 251 U.S. 259 14
Southern Railway v. Prescott, 240 U.S. 632 27

Page

Standard Combed Thread Co. v. Pennsylvania R.R., 88 N.J. Law, 257 27

St. Louis, Iron Mountain & Southern Ry. v. Starbird, 243 U.S. 592 14

Texas & Pacific Ry. Co. v. Cisco Oil Mill, 204 U.S. 449 18

Texas & Pacific Ry. v. Leatherwood, 250 U.S. 478 27

Texas & Pacific Ry. v. Mugg, 202 U.S. 242 16, 17, 39

Union Pacific R.R. Co. v. American Smelting & Refining Co., 202 Fed. 720 16, 23

Western Transit Co. v. A. C. Leslie & Co. Ltd., 242 U.S. 448 26

Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92 38

Wilder v. Cowles, 100 Mass. 487 32

Yosemite Gold Mining & Milling Co. v. Emerson, 208 U.S. 25 38

Supreme Court of the United States.

October Term, 1920.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
PLAINTIFF IN ERROR AND PETITIONER,
v.
YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY,
PLAINTIFF IN ERROR AND PETITIONER,
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

BRIEF OF THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

STATEMENT OF THE CASE.

This was an action of contract brought by the Railroad Company in the Superior Court for the County of Suffolk, Massachusetts, to recover balances of freight and refrigeration charges on nine interstate shipments of produce, all consigned to Boston to the York & Whitney Company.

The balance sought on each of the several shipments represents the difference between the amount paid by the consignee on acceptance of the property from the Railroad Company as terminal carrier and the correct charges according to the applicable tariffs of the carriers duly filed with the Interstate Commerce Commission, as required by the Act to Regulate Commerce. The York & Whitney Company denied its liability, on the ground that it did not own the shipments, but received and handled them merely as commission merchant and as agent for the shippers.

The shipments involved, grouped for convenience, were as follows:

> One carload of cantaloupes originating on the Oregon Short Line Railroad at Payette, Idaho, August 31, 1911.
>
> Five carloads of cantaloupes originating on the Oregon Short Line Railroad at Payette, Idaho, in September, 1911.
>
> One carload of pie-plant originating at Chicago on April 25, 1912, and two carloads of peaches originating at Hamlin, New York, in September, 1912.

All the shipments moved into Boston over the Boston & Albany Railroad, leased to and operated by The New York Central & Hudson River Railroad Company, and were delivered to the consignee, York & Whitney Company.

The carloads of cantaloupes *en route* to Boston moved into Chicago by way of the Chicago & Northwestern Railroad, whose agent at that place, in changing the railroad waybills to carry the cars forward to

Boston, by mistake failed to add to the charges at that time appearing on the waybills additional charges for the transportation from Chicago to Boston. The error of the agent at Chicago was repeated by The New York Central & Hudson River Railroad Company at Boston, in rendering freight bills, so that the freight bills as originally presented to and paid by the York & Whitney Company called for merely the approximate charges for transportation between Payette and Chicago, with no charges for the journey from Chicago to Boston.

Immediately on receiving notice from the Railroad Company on September 11, 1911, of the arrival on that day of the first carload of cantaloupes, an agent of the York & Whitney Company called on the telephone the office of the local freight agent of the Railroad Company at Boston, asked what were the freight charges on this shipment, and stated that the six carloads of cantaloupes which were expected were commission goods, and that the York & Whitney Company wished to know what the charges would be before it decided to accept the consignment. The agent of the York & Whitney Company was informed over the telephone that the charges on the first car were $222.20, which was $108.49 less than the lawful charges according to the tariffs. Later on the same day the Railroad Company delivered to the York & Whitney Company a freight bill showing $222.20 as the total charges due on the car; the York & Whitney Company paid the bill and accepted the shipment.

The York & Whitney Company, before accepting any of the cantaloupes or paying any of the charges thereon, also wrote to the traffic manager of the Rail-

road Company at Boston on September 11, 1911, as follows:

> "We are interested at this time in the current tariff rates on cantaloupes, in car lots, under refrigeration from Payette, Idaho, to Boston.
>
> "Will you kindly inform us as to this rate with tariff references, etc., giving us this information at once if possible."

The Railroad Company on September 14, 1911, wrote and mailed to the York & Whitney Company the following letter:

> "Replying to your letter of Sept. 11th:
>
> "Would advise that the present rate on cantaloupes, in carloads from Payette, Idaho, to Boston, Mass., is made up as follows:—
>
> "Present rate on cantaloupes in carloads of 20,000 lbs. minimum weight Payette, Idaho to Chicago, 75¢ per 100 lbs. Authority of Oregon Short Line R.R. I.C.C. 1707. Present rate from Chicago to Boston on cantaloupes in carloads of 24,000 lbs. minimum weight in car not exceeding 36 ft., 6 in., in length 39¢ per 100 lbs. authority of L.S. and M.S. ICC-A 2474. The refrigeration charge from Payette, Idaho, to Boston on cantaloupes carloads is $65.00 per car, authority of O.S.L.R.R. I.C.C No. 1748."

The information as to rates and charges contained in this letter was correct. It was received by the consignee September 15, 1911, which was after it had taken delivery of the first carload of cantaloupes, had paid the original freight bill, calling for less than the tariff

rates on that car, and had accounted to the shipper for the proceeds of the sale; but the letter was received by the consignee five days before it took delivery of or sold or accounted for any of the remaining five carloads of cantaloupes or paid any of the original freight bills for charges thereon.

A few days after the defendant had accounted to the shipper for the last carload of cantaloupes the Railroad, in checking up the freight bills, discovered the error, and sent to the consignee supplemental freight bills for the amounts still due according to the tariffs.

The charges claimed on the carload of pie-plant originating at Chicago are for necessary icing at Karners, New York, a regular icing station *en route*. The charges on the two carloads of peaches originating at Hamlin, New York, are for necessary icing at Charlotte, New York, a regular icing station *en route*. These charges, by reason of the carriers' mistake, did not appear in the freight bills as originally presented. They are the correct charges, according to the carriers' applicable tariffs duly filed with the Interstate Commerce Commission, as required by the Act to Regulate Commerce.

The consignee received and sold the pie-plant and peaches as commission merchant; in each instance paid the freight bill as originally presented and remitted the net proceeds of sale to the shippers before receiving from the Railroad supplemental bills for the disputed icing charges. The York & Whitney Company had no actual knowledge that the ice in question had been furnished, but it knew that Karners and Charlotte were regular icing stations. The shipments

moved in the usual course of freight transportation.

The shippers of the pie-plant and peaches in each instance instructed the carrier to keep the car iced to destination, and it was specified in the bill of lading covering each shipment that the car should be kept iced to destination.

The Railroad Company knew that a large portion of the consignee's business was handled on commission, but the extent of its business was not fully known to the Railroad Company, and the fact that the pie-plant and peaches were received by the York & Whitney Company as commission merchant was not communicated to the Railroad Company until several days after the delivery of the shipments to the consignee.

All the shipments involved in this suit were covered by so-called "straight" bills of lading, issued at the several points of origin, all in the standard form, approved by the Interstate Commerce Commission, and prescribed by the carriers' classification of freight, in force and applicable, and published and filed with the Interstate Commerce Commission as required by the Act to Regulate Commerce. Each bill of lading was signed by the shipper and the agent of the carrier at the point of origin.

There was nothing appended to the name of the consignee in the bills of lading to indicate that the shipments were consigned to it as commission merchant or as agent for the shippers.

Each of the bills of lading covering the property shipped thereunder contained the following provision:

> "SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on

said property, and, if required, shall pay the same before delivery."

York & Whitney Company never had possession of the bills of lading and had no actual knowledge that they had been issued, but knew that usually bills of lading were issued to cover shipments of freight, and had seen and handled many such bills.

The case was tried before a jury on an "agreed statement of facts," from which all proper inferences might be drawn. After the parties had rested, the Railroad Company moved that a verdict be ordered for it for the full amount claimed in its declaration, and the York & Whitney Company moved that a verdict be ordered in its favor. The Trial Court at that time refused to make any rulings on the motions, but submitted certain questions to the jury.

As to the first carload of cantaloupes, the jury were asked the following questions, and gave thereto the following answers:

"4. Did or did not the defendant [York & Whitney Company] accept the first carload of cantaloupe understanding that the plaintiff [Railroad Company] looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. No.

"13. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the first item of the account annexed to the declaration?

"Ans. No.

"22. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the first item of the account annexed to its declaration?

"Ans. Yes."

As to the second carload of cantaloupes, the jury were asked the following questions, and gave thereto the following answers:

"5. Did or did not the defendant [York & Whitney Company] accept the second carload of cantaloupe understanding that the plaintiff [Railroad Company] looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"14. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the second item of the account annexed to the declaration?

"Ans. Yes.

"23. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the second item of the account annexed to its declaration?

"Ans. No."

Like questions were submitted to the jury as to the third, fourth, fifth, and sixth carloads of cantaloupes and the carload of pie-plant and the two carloads of peaches. In each instance the same answers were given as were given to questions 5, 14, and 23 with respect to the second carload of cantaloupes.

The Railroad Company also requested instructions and rulings, including the following, respecting its right to recover all the charges claimed:

> "5. The defendant [York & Whitney Company] promised by implication to pay the full charges, according to the account annexed [to the plaintiff's declaration], based on the rates lawfully established under the Interstate Commerce Act.
>
> "6. The tariff rates were the only rates which the plaintiff [Railroad Company] could lawfully receive, and the plaintiff was bound to exact and the defendant bound to pay, the lawful charges based on the tariff rates.
>
> "10. The defendant was charged with knowledge of the conditions, respecting the payment of freight and other charges, contained in the bills of lading covering the several shipments of produce.
>
> "17. The defendant, as consignee, under the bills of lading covering the produce involved in this suit, became bound to pay the freight and all other lawful charges accruing on said produce, according to the published schedules of rates in force and applicable."

The Court refused to give the instructions or make the rulings requested.

After the answers of the jury had been received, both parties renewed their motions for verdicts. The Trial Court then ruled that the Railroad Company could not recover on the first item in the account annexed to its declaration, viz., $108.49, the undercharges on the first carload of cantaloupes, but ordered a verdict for the

Railroad Company on the remaining eight items, amounting to $543.87, the full amount claimed as undercharges on all the remaining shipments, together with $175.13 interest, making a total of $719. The declaration was in form authorized by Mass. Public Statutes, 1882, c. 167, sec. 2, clause seventh, and sec. 94.

The Trial Court reported the case to the Supreme Judicial Court for the Commonwealth for the determination of all questions of law. The Supreme Judicial Court held that the Trial Court rightly directed a verdict on the answers returned by the jury and ordered judgment for the Railroad Company on the verdict, denying the contention of the Railroad Company, made also before that Court, that under the Act to Regulate Commerce and on the undisputed facts a verdict should have been rendered in favor of the Railroad Company for the undercharges on the first carload of cantaloupes, as well as for the undercharges on all the remaining shipments (230 Mass. 206).

The records are brought to this Court on a writ of error of the Railroad Company and on a writ of certiorari granted on its petition, seeking to reverse the judgment of the State Court rendered against the Railroad Company on the first item in the account annexed to its declaration, involving the undercharges on the first carload of cantaloupes, and on a cross-writ of error brought by the York & Whitney Company and on a writ of certiorari granted on its petition, seeking to reverse the judgment of the State Court in favor of the Railroad Company on the remaining items in the account annexed, involving the undercharges on all the other shipments.

The main question presented to this Court on the Railroad Company's writs of error and certiorari is whether the Massachusetts Supreme Judicial Court erred in confirming the judgment against the Railroad Company on the first item in the account annexed, representing the undercharges on the first carload of cantaloupes.

The main question presented to this Court on the York & Whitney Company's writs of error and certiorari is whether the State Court erred in confirming the judgment in favor of the Railroad Company on the remaining items in the account annexed, representing the undercharges on all the remaining shipments.

SPECIFICATION OF ERRORS.

The Railroad Company's assignment of errors is as follows:

"I.

"The Massachusetts Supreme Judicial Court in denying to the plaintiff the right to recover on the first item in the account annexed to its declaration, holds that a consignee who receives interstate produce as commission merchant and so notifies the delivering carrier is not liable to pay the full tariff charges unless disclosed to the consignee at the time of delivery. This is in conflict with the Act to Regulate Commerce as amended, as construed by the United States Supreme Court, providing that no carrier shall charge or collect a less or different compensation for interstate transportation than the rates specified in their filed tariffs, and that no carrier shall refund or remit in any manner or by any devise any portion of

the rates and charges so specified, nor extend to any person any privileges in transportation except as specified in such tariffs.

"II.

"The decision holds that it is lawful for a carrier to charge and a consignee to pay for the transportation of goods in interstate commerce a rate which is less than the rate prescribed by the duly filed tariffs. This is in conflict with the Elkins Act and the Act to Regulate Commerce, as construed by the United States Supreme Court, prohibiting discrimination and the giving or receiving of any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce whereby such property shall be transported at a less rate than that named in the tariffs.

"III.

"The decision in effect holds that it is lawful to waive the provisions of the interstate bill of lading, issued under the Carmack amendment and constituting a part of the duly filed classification of the carriers, providing that the owner or consignee shall pay the freight and all other lawful charges on the property transported. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court.

"IV.

"The decision holds that it is lawful for a consignee accepting an interstate shipment under such a bill of lading to make with the carrier a

special agreement with respect to the payment of freight charges, contrary to the provisions of the bill of lading and the duly filed classifications and tariffs. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court.

"V.

"The decision holds in effect that the public is not charged with knowledge of the provisions of the duly filed classifications and tariffs of interstate carriers and that such tariffs and classifications have not the binding force of statute. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court."

The reasons relied on by the Railroad Company for the allowance of its petition for a writ of certiorari were similar.

ARGUMENT.

I.

Questions Presented under the Railroad Company's Specification of Errors.

The Railroad Company's assignment of errors (Rec. pp. 70, 71) raises the question whether the Railroad is entitled to recover the undercharges on the first carload of cantaloupes, as a matter of law, under the Acts of Congress relating to interstate commerce and the bill of lading issued under the Carmack amendment. This is a Federal question.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink*, 250 U.S. 577.

Cincinnati, New Orleans & Texas Pacific Ry. v. *Rankin*, 241 U.S. 319, 326, 327.

Gulf, Colorado & Santa Fe Ry. v. *Texas Packing Co.*, 244 U.S. 31, 34.

Georgia, Florida & Alabama Ry. v. *Blish Milling Co.*, 241 U.S. 190, 195.

St. Louis, Iron Mountain & Southern Ry. v. *Starbird*, 243 U.S. 592.

Southern Pacific Co. v. *Industrial Accident Commission*, 251 U.S. 259.

The State Court erred in confirming the judgment denying the Railroad Company's claim for the undercharges on the first carload of cantaloupes.

A. The Interstate Commerce Act.

Section 6 of the Act to Regulate Commerce requires carriers subject to that Act to file schedules of all rates and charges for interstate transportation, and provides also as follows:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper

or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

34 Stat. 584, 587 (June 29, 1906).

Under section 2 of the Act to Regulate Commerce, if any common carrier by any device shall charge or receive from any person a less compensation for any service in transportation than it charges or receives from any other person for the same service, such carrier is guilty of unjust discrimination, which is prohibited. Under section 10 of the Act such discrimination is punishable by fine and imprisonment, and by the Elkins Act penalties are imposed on both carriers and shippers for violation of the law.

34 Stat. 584, 587, 588 (June 29, 1906).
36 Stat. 539, 549 (June 18, 1910).
32 Stat. 847 (Feb. 19, 1903).

In construing the Acts of Congress this Court in many cases has held that the full tariff rates are the only rates which the carrier may lawfully receive or the person liable properly pay. The public is charged with knowledge of the lawful rates. Misstatement of the rates, whether intentional or accidental, will not bind the carrier; they have the force of statute; they cannot be varied under any pretext.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra.*
Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94.

Texas & Pacific Ry. v. *Mugg*, 202 U.S. 242.
Dayton Coal & Iron Co. v. *Cincinnati, New Orleans & Texas Pac. Ry.*, 239 U.S. 446.
Louisville & Nashville R.R. v. *Mottley*, 219 U.S. 467.
Kansas Southern Ry. v. *Carl*, 227 U.S. 639, 653.
Gulf, Colorado & Santa Fe Ry. v. *Hefley*, 158 U.S. 98.
Pennsylvania R.R. v. *International Coal Co.*, 230 U.S. 184.

In the application of this rule it has been held by this Court and State Courts that a consignee of an interstate shipment who accepts the property and pays the charges thereon demanded by the carrier at the time of delivery is liable for any balance of charges subsequently found to be due under the tariff. This liability is imposed on the consignee, although not a party to the original contract of shipment, because the consignee accepts the property transported knowing that it is subject to a lien for the charges arising from the transportation, knowing or charged with knowledge of the lawful tariff rates thereon, and knowing or charged with knowledge that the carrier may not properly ask or receive less than the full tariff charges.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra.*
Union Pacific R.R. Co. v. *American Smelting & Refining Co.*, 202 Fed. 720.
New York, New Haven & Hartford R.R. Co. v. *York & Whitney Co.*, 215 Mass. 36.

Pennsylvania Railroad v. *Titus*, 216 N.Y. 17.

Emerson v. *Central of Georgia Railway*, 196 Ala. 280.

In *Pittsburgh, Cincinnati, Chicago & St. Louis Ry.* v. *Fink, supra*, it was held that such a consignee was liable for the full balance of charges, even though he was not the owner of the property when he accepted delivery, and even though before the undercharges were discovered he had changed his position relying in good faith on the rate quoted by the carrier. See also—

Texas & Pacific Ry. v. *Mugg, supra.*

In *New York, New Haven & Hartford R.R. Co.* v. *York & Whitney Company, supra*, and *Pennsylvania Railroad* v. *Titus, supra*, the consignee was held liable for such undercharges although acting merely as a commission merchant and agent for the shipper, and although the consignee must suffer the loss, having accounted to the shipper. See also—

Louisiana Railway & Navigation Co. v. *Holly*, 127 La. 615.

Jackson, Receiver, v. *Piowaty*, 205 Ill. App. 329.

The State Court held that the inexorable provisions of the Federal law as to rates did not apply in this case because the consignee was not the owner of the goods and had notified the terminal carrier before accepting them at destination that it was receiving the property in its capacity as commission merchant and as agent for the shippers (Record, p. 46).

The State Court asserted that the shipper has within his reach, both theoretically and practically, facilities for ascertaining the lawful rate because schedules are required to be posted in every depot (Record, p. 45); that the same opportunity to ascertain the true rate may not be open to the consignee and was not in fact open to the consignee in this case because the lawful rate could be found only by adding the rate of several railroads between Payette and Boston (Record, p. 46).

The State Court erred in conceiving the practical situation of the shipper better than that of the consignee. There was in this case no through rate, so that neither at the point of origin nor at the point of destination would an examination of any schedule required to be posted reveal the sum of the several rates (Record, p. 29). The requirement as to the filing of schedules applied equally to all the carriers, including the carrier at destination as well as the carrier at the point of origin.

The State Court also erred in regarding the absence of practical means open to the consignee to ascertain the lawful rate as ground for relieving it from liability. Complete failure to post tariffs will not affect their validity nor excuse payment of charges accruing thereunder. The schedules become operative upon filing with the Interstate Commerce Commission.

Berwind-White Coal Mining Co. v. *Chicago & Erie R.R. Co.*, 235 U.S. 371, 375.

Texas & Pacific Ry. Co. v. *Cisco Oil Mill*, 204 U.S. 449, 451.

Louisiana Ry. & Navigation Co. v. *Holly*, *supra*.

The consignee, whatever may have been its actual opportunity to examine schedules or its actual knowledge of their contents, was conclusively presumed to know the lawful rates.

Kansas Southern Ry. v. *Carl, supra,* 653.
Louisville & Nashville R.R. v. *Maxwell, supra.*
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra.*

It is immaterial that the tariffs were difficult to understand (Record, p. 34).

Chicago & Alton R.R. v. *Kirby,* 225 U.S. 155.

The State Court held that the consignee's agreement "was not a general one to pay the legal tariff, but a special agreement to pay only the amount demanded" (Record, p. 47).

Special agreements to pay less than the tariff rates are absolutely forbidden, and repeatedly have been held invalid.

Dayton Coal & Iron Co. v. *Cincinnati, New Orleans & Texas Pacific Ry., supra.*
Atchison, Topeka & Santa Fe Ry. v. *Robinson,* 233 U.S. 173.
Chicago & Alton R.R. v. *Kirby, supra.*

It is not necessary to consider what would be the rights of the parties if the consignee, in notifying the Railroad Company that the consignee was merely a commission merchant, had also asserted that it would not be responsible for any of the charges. In the case at bar the consignee, in spite of its notice of the agency,

did undertake to pay the charges. That there was an agreement by the consignee to pay at least a portion of the charges is not disputed.

The consignee as well as the Railroad Company had actual knowledge of the point of origin of the shipment, its nature, its weight, and its routing. This information was contained on the freight bill (Record, p. 36, Exhibit A). The rate was stated thereon incorrectly, but of this error the consignee was bound in law to know, as it was conclusively presumed to know the lawful rate. The consignee in legal contemplation was in the position of having accepted the property knowing the correct charges and knowing that it was paying an illegal and not a legal amount.

At the time of the delivery of the shipment the consignee intended to pay and the agents of the Railroad intended to collect the full tariff charges; both consignee and Railroad Company knew that the full charges were due (Record, p. 36, Exhibit A), and both believed the full charges were being paid (Record, pp. 20, 28, 29). Prior to the delivery of the shipment the consignee wrote to the Railroad Company that it was "interested at this time in the current tariff rates on cantaloupes" between Payette and Boston (Record, p. 23), evincing its expectation to be called upon to pay "the current tariff rates" between those points. The freight bill itself purported to cover the full charges, requesting payment of "charges on freight way-billed from Payette" and bearing notice that "charges must be paid on delivery of freight" (Record, p. 36, Exhibit A).

The Railroad Company had a lien on the shipment for the full lawful charges. Regardless of any notice

of agency, the consignee could not discharge the lien, and was not entitled to require the delivery of the goods to it without payment of the entire charges.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra,* p. 582.

That notice to the Railroad that the consignee is not the owner of the goods is ineffectual to relieve the consignee of liability for the full charges is indicated by the language of this Court in—

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra,* p. 582:

> "It is alleged that a different rule should be applied in this case because Fink by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no proof that such agreement was known to the carrier, nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods."

The ruling of the State Court leaves the consignee and the Railroad Company in the position of having contracted for a rate which was unlawful.

B. The Bill of Lading.

The bill of lading covering the transportation of the cantaloupes was the "Uniform Bill of Lading" in the standard form (Record, p. 39), approved by the Interstate Commerce Commission June 27, 1908 (14 I.C.C. Reports, 346), adopted by carriers and made a part

of their Classification of Freight, duly published and filed with the Interstate Commerce Commission as required by section 6 of the Act to Regulate Commerce (Record, p. 22).

34 Stat. 584, 586.

The bill of lading contained the following clause:

> "Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery."

At common law, by the weight of authority, a consignee by accepting property under a bill of lading calling for payment of freight from him became bound by a contract implied in law to pay the charges. The rule was the same, although the consignee was not the owner of the goods, but merely an agent for the shipper, provided the consignee was not designated as agent in the bill of lading. Mr. Chief Justice Bigelow said in—

Boston & Maine R.R. v. *Whitcher*, 1 Allen, 497, 498:

> "Whoever accepts delivery under such a bill of lading contracts, by implication, to pay the freight due on them; and if the name of the agent only is inserted in the bill without any designation of the character or capacity as agent for another in which he receives the goods, he is liable individually for the freight, because he thereby becomes an original contractor to pay therefor."

Pennsylvania Railroad v. *Titus, supra.*

Union Pacific Railroad v. *American Smelting & Refining Co., supra.*
Davison v. *City Bank*, 57 N.Y. 81.
Old Colony Railroad v. *Wilder*, 137 Mass. 536.

Since the Carmack Amendment, 34 Stat. 584, 595 (June 29, 1906), under which bills of lading for interstate transportation are issued, such bills of lading must be interpreted in the light of the Acts of Congress.

C., C., C. & St. L. Ry. v. *Dettlebach*, 239 U.S. 588, 593.

The State Court held that the consignee was not liable under the bill-of-lading clause. Its decision is on the following grounds:

First: The bill-of-lading clause was that the "owner or consignee" should pay the freight, and not an express stipulation that the consignee alone should pay (Record, p. 47).

Second: The bill of lading was not an "order," but a "straight" bill of lading, which never came to the consignee's possession; the consignee had no actual knowledge of its terms, and could not be presumed to know them (Record, p. 47).

The State Court misinterpreted the bill-of-lading clause, and failed to give proper significance to the duly filed bill-of-lading form.

1. The bill-of-lading clause imposing liability for freight charges on the "owner or consignee" should be interpreted as applicable to the consignee.

The practice of railroad carriers, as a matter of common knowledge, is to collect freight charges at destination. The carrier's lien does not attach until after the transportation service has been performed. It is the terminal carrier which is charged with the duty of collecting the full rates by Conference Ruling No. 16 of the Interstate Commerce Commission, which provides:

> "Even though an undercharge results from an error in billing by the initial carrier or a connection, the delivering carrier must collect the undercharge."

Section 8 of the uniform bill of lading obviously is intended for the benefit of the carriers and to facilitate collection of charges. It is more rational to hold that the words "owner or consignee" apply to the one taking delivery rather than the shipper, even though the consignee may not be both consignee and owner.

The consignee presumptively and in fact usually is both owner and consignee of the goods described in the bill of lading; but in some instances, as in the case at bar, the consignee is not in fact the owner. Both words are thus used disjunctively that the clause may be broad enough to cover all cases and effectual to insure the collection of charges at destination in accordance with the common practice and the rule of the Interstate Commerce Commission.

The reference in the clause to payment of charges

"before delivery" is also significant of an intention that it should be applicable to the situation presented at the time of the arrival and delivery of the property.

The construction contended for has been judicially accepted.

Pennsylvania R.R. v. *Titus, supra*, 20.

An examination of the original papers shows that the bill-of-lading clause was in this form in—

New York, New Haven & Hartford R.R. Co. v. *York & Whitney Co., supra*—

and the same construction was there adopted.

2. The consignee was charged with knowledge of the bill-of-lading clause.

The State Court, referring to the report of the Interstate Commerce Commission approving the uniform bill of lading, quotes the opinion of the Commission that the form was "not intended to take the place of special bills of lading which are issued on particular commodities . . . such as live stock, for example, and perhaps perishable property" (14 I.C.C. Reports, 346, 349). The Court concluded that the consignee could not be held to know that the uniform bill, and not a special bill, was issued in this case (Record, p. 47). The indefiniteness in the opinion of the Commission, which was merely advisory, was immaterial. On the agreed facts, the bill of lading involved in this case was not only in form approved by the Commission, but it was in the form *prescribed* by the carriers' duly filed classification (Record, p. 22). Since this was prescribed, no other form could lawfully be used.

Of this the consignee must be charged with knowledge.

Chicago & Alton R.R. v. Kirby, supra.

The consignee actually knew that usually bills of lading were issued to cover shipments of freight, and in the course of its business had seen and handled many bills of lading (Record, p. 22). The consignee was also bound to know that the initial carrier was required to issue a bill of lading or receipt by virtue of the Carmack Amendment.

It is immaterial that the consignee never had possession of the bill of lading and had no actual knowledge of its terms. It was a part of the duly filed classification; the consignee was charged with knowledge of its provisions. Numerous decisions of this Court hold shippers, consignees, and the public charged with knowledge of all applicable rules, regulations, and provisions contained in duly filed schedules and classifications.

Georgia, Florida & Alabama Ry. v. Blish Milling Co., supra.

Western Transit Co. v. A. C. Leslie & Co., Ltd., 242 U.S. 448.

Boston & Maine R.R. v. Hooker, 233 U.S. 97.

Louisville & Nashville R.R. v. Maxwell, supra.

If a bill of lading had been issued in an unauthorized form, in which the clause in question had been stricken out, or if by mistake no bill of lading had been issued, the rights of the parties would be none the less deter-

mined by the provisions of the standard form as filed, the same as though a bill of lading in proper form had been issued.

Chicago & Alton R.R. v. *Kirby, supra.*
Atchison, Topeka & Santa Fe Ry. v. *Robinson, supra.*
Standard Combed Thread Co. v. *Pennsylvania R.R.*, 88 N.J. Law, 257.

The consignee in contemplation of law accepted the goods under the bill of lading, and the numerous decisions previously cited, holding that such a consignee becomes bound by a contract implied in law to pay the freight charges, are applicable.

BILL-OF-LADING CLAUSE CONTROLS.

The bill-of-lading clause required the payment of "the freight and all other lawful charges." It was beyond the power of the Railroad Company and the York & Whitney Company to waive or alter this provision by an agreement whereby the consignee became liable for a part only of the lawful charges. The clause was absolutely binding on the parties.

Texas & Pacific Ry. v. *Leatherwood*, 250 U.S. 478, 481.
Missouri, Kansas & Texas Ry. v. *Ward*, 244 U.S. 383, 388.
Northern Pacific Ry. v. *Wall*, 241 U.S. 87.
Metz Co. v. *Boston & Maine R.R.*, 227 Mass. 307.

In *Southern Railway* v. *Prescott*, 240 U.S. 632, 638, this Court said:

> "It is . . . clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations."

In *Erie Railroad* v. *Stone*, 244 U.S. 332, 336, this Court said:

> "The binding force of these contracts and regulations has been affirmed in many cases."

The consignee was not bound to accept the goods, but, since it did accept property transported in interstate commerce, it must be held to have done so subject to the terms of the standard bill of lading, understanding that no modification of its provisions was permissible. Notice of the agency was ineffectual. The consignee accepting the property could not impose a condition in derogation of the duly filed classification.

C. Discrimination.

The consignee contends that the provisions of the Interstate Commerce Act prohibiting discrimination are satisfied in this case because the shippers were liable for the full charges. This shipment was from an association of fruit growers in Idaho, without capital, which ceased to do business shortly after consigning the property (Record, p. 28). If the consignee is not liable, the carrier is left with a cause of action unenforceable.

Produce dealers throughout the country consign produce to commission merchants at Boston (Record, p. 33). Railroads are required to transport numerous shipments from associations of indefinite or unknown

owners, from whom recovery of undercharges would be uncertain, if not impossible. Carriers receiving such shipments for transportation, with no notice at the time of shipment that the consignee is agent for the shipper, rely on recovering full charges from the bill-of-lading consignee at destination. If the consignee, after the transportation is completed, may escape responsibility for undercharges by notifying the terminal carrier that the consignee is receiving the commodity as a commission merchant, in numerous instances the full tariff charges cannot be collected. Unlawful discrimination will result.

II.

Questions Presented under the York & Whitney Company's Specification of Errors.

In the Superior Court the jury found from the "agreed statement of facts" offered in evidence that the York & Whitney Company accepted the remaining five carloads of cantaloupes and the pie-plant and peaches understanding that the Railroad Company looked to it for the payment of all lawful charges, and that the York & Whitney Company impliedly agreed to pay the balances of charges as claimed in the Railroad Company's declaration (Record, pp. 2, 3). The Trial Court then ordered a verdict for the Railroad Company on the findings (Record, p. 11). The question before the Supreme Judicial Court was whether the findings of fact were warranted as a matter of law (Record, p. 43).

Frati v. *Jannini*, 226 Mass. 430, 432.

Hecht v. *Batcheller,* 147 Mass. 335, 339.
Old Colony R.R. v. *Wilder, supra,* 538.

The Supreme Judicial Court held that the inference was warranted from the facts that the consignee agreed to pay the lawful rates and charges (Record, pp. 48, 49, 50), and confirmed the judgment for the Railroad Company (Record, p. 51).

The assignment of errors of the York & Whitney Company in substance raises the following questions:

1st. Was the decision of the State Court correct in holding justified the finding that the York & Whitney Company agreed to pay the full rates (Assignment of Errors Nos. 1, 6 to 15, incl., Record, pp. 59, 60, 61)?

2d. Was the decision of the State Court correct in holding justified the finding that the Railroad Company was not estopped to collect the charges and that the York & Whitney Company was not entitled to recoup damages (Assignment of Errors Nos. 2, 3, Record, p. 60)?

A. The Consignee Agreed to Pay the Lawful Rates.

The State Court was correct in holding that the finding that York & Whitney Company agreed to pay the full rates was justified.

1. The undercharges on the remaining five carloads of cantaloupes.

The reasons hereinbefore urged for the reversal of the judgment against the Railroad Company on the first carload of cantaloupes apply with equal force in support of the judgment for the Railroad Company on

the remaining five carloads. The decision is also supported by the correspondence which passed between the parties, the effect of which was for the State Court.

Dower v. *Richards*, 151 U.S. 658.

On the day when the first carload of cantaloupes arrived in Boston the York & Whitney Company wrote to the Railroad Company's traffic manager asking for the tariff rates on cantaloupes from Payette to Boston, with tariff references (Record, p. 23). Three days later the Railroad Company's general freight agent, after acquiring information from the Oregon Short Line, wrote to the York & Whitney Company a letter giving the information requested (Record, p. 24). The letter was received by the York & Whitney Company on September 15, 1911 (Record, p. 1), five days before it took delivery of any of these five carloads or paid the original bills for charges thereon (Record, pp. 23, 26, 27, 36, 37, 38, Exhibits B, C, D, E, F).

The letter from the Railroad Company's general freight agent plainly stated that the rate between Payette and Chicago was 75¢ per 100 lbs., and from Chicago to Boston 39¢ per 100 lbs. (Record, p. 24). This was correct and in accordance with the duly filed tariffs (Record, p. 29). The original freight bills covering these carloads, as presented by the local freight agent to the York & Whitney Company in each instance, gave the rate as only 75¢ (Record, pp. 36, 37, 38, Exhibits B, C, D, E, F). A simple comparison of the rates quoted in the letter with the freight bills would have disclosed the omission of the charges for transportation from Chicago to Boston.

The traffic manager and general freight agent were

both higher in authority than the agent at the local freight office and others there employed who stated to the York & Whitney Company the amount of the freight charges on the successive cars as they arrived (Record, pp. 25, 48).

The written request for the statement of interstate rates made by the York & Whitney Company required the Railroad Company, under penalty, to state accurately in writing the applicable rates.

Act to Regulate Commerce, sec. 6; 36 Stat. 548.

The York & Whitney Company was bound to know that the written statement was authoritative and to be relied upon in preference to the charges appearing on the freight bills issued from the local office and in preference to the oral statement from a person there employed.

These letters, in connection with the other circumstances, afforded sufficient basis for the finding in favor of the Railroad Company (Record, p. 48; Assignment of Errors No. 5, Record, p. 60).

The fact that notice was given to the Railroad Company by the consignee that it was acting merely as commission merchant did not require the State Court to hold, as a matter of law, that the consignee was not liable. An agent may be bound personally at common law, although the agency is disclosed. The jury could find properly that the consignee, although known to be an agent, impliedly promised to pay the charges.

Elwell v. *Skiddy*, 77 N.Y. 282.
Wilder v. *Cowles*, 100 Mass. 487, 491.

Brown v. *Bradlee*, 156 Mass. 28.
Hutchinson on Carriers (3d ed.), sec. 807, p. 898.

The York & Whitney Company also complains of error (Assignment of Errors No. 4, Record, p. 60) in the following assertion by the State Court with reference to the liability of the York & Whitney Company for the undercharges on these five carloads of cantaloupes (Record, p. 48):

> "It [the consignee] was bound to know, also, that the only charge which the plaintiff lawfully could make was that established by the published tariff."

It is plain that the State Court properly stated and applied the Federal law. These were interstate shipments. It is thoroughly well settled that shippers, consignees, and the public alike are bound to know that the only lawful rate is the tariff rate.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink*, *supra*.
Louisville & Nashville R.R. v. *Maxwell*, *supra*, and cases cited.

2. The undercharges on the pie-plant and peaches.

These charges were for necessary icing of interstate shipments in transit, all moving in the usual course of freight transportation and all consigned to the York & Whitney Company at Boston, Massachusetts. The shipper in each instance instructed the carrier to keep the car iced to destination (Record, pp. 29, 30, 31).

The carload of pie-plant originated at Chicago April

25, 1912, was iced at the starting point, at Detroit, Suspension Bridge, New York, and Karners, New York. The freight bill as originally presented by the Railroad Company to and paid by the York & Whitney Company at the time of delivery of the property at destination included the charges for icing at Chicago, Detroit, and Suspension Bridge, but by mistake the charges for icing at Karners were omitted (Record, pp. 29, 30).

The two carloads of peaches originated at Hamlin, New York, in September, 1912, were iced at the point of shipment, at Charlotte, New York, and West Albany, New York. The freight bills as originally presented to and paid by the York & Whitney Company at the time of delivery included the charges for icing at Hamlin and West Albany, but by mistake the charges for icing at Charlotte were omitted from the bills (Record, pp. 30, 31).

The York & Whitney Company received and handled the pie-plant and peaches as commission merchant, sold the property, and accounted to the shippers. A few days thereafter the Railroad Company, discovering the error, requested the consignee to pay the disputed charges.

The icing was in fact necessary to keep the cars properly refrigerated. The defendant knew that Karners and Charlotte were regular icing stations *en route* (Record, pp. 30, 31, 32).

All the charges arose under the duly filed tariffs of the carriers, and were correct (Record, pp. 30, 31, 32).

The defendant was named as consignee in the bills of lading. It was presumptively the owner (Record, p. 50). The jury could find that the Railroad Com-

pany rightly treated the consignee as owner in fact, and looked to it for the payment of all charges. The bills of lading called for payment of all lawful charges from the "owner or consignee" (Record, p. 32). Acceptance of the goods by the consignee was strong evidence of an implied promise by it to pay the charges.

The Railroad Company was not notified that the consignee was receiving the pie-plant and peaches as commission merchant until after delivery (Record, p. 33). The Railroad Company cannot be charged as a matter of law with knowledge that the shipments were consigned to the York & Whitney Company as commission merchant from information that a portion of its business generally was handled in this way, nor from information that the cantaloupes were commission goods.

New York, New Haven & Hartford R.R. Co. v. *York & Whitney Company, supra.*
Singer v. *Merchants Despatch Transportation Co.*, 191 Mass. 449, 455.
Jackson, Receiver, v. *Piowaty, supra.*

The consignee, although not in fact the owner of the property, by accepting the interstate shipments contracted to pay all lawful tariff charges. The judgment of the Lower Court was justified, if not required.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra.*
New York, New Haven & Hartford R.R. Co. v. *York & Whitney Company, supra.*
Pennsylvania R.R. v. *Titus, supra.*
Emerson v. *Central of Georgia Ry., supra.*

New York, New Haven & Hartford R.R. Co. v. *Sampson*, 222 Mass. 311.
Boston & Maine R.R. v. *Oceanic Steam Navigation Co.*, 226 Mass. 509.
Boston & Maine R.R. v. *Whitcher*, *supra*.
Old Colony R.R. Co. v. *Wilder*, *supra*.
10 Corpus Juris, 446.

See also the cases cited and the argument relating to the undercharges on the first carload of cantaloupes.

No sound distinction between the case at bar and those cited can be made on the ground that icing charges are unlike charges strictly for carriage.

In section 1 of the Interstate Commerce Act the term "transportation," to which the Act applies, includes—

> "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."
>
> 36 Stat. 545.

Section 6 of the Act provides that the filed schedules of rates, among other things, shall state—

> "all terminal charges, storage charges, icing charges . . . all privileges or facilities granted or allowed . . . "
>
> 34 Stat. 586.

Section 6 further provides that it shall be unlawful for any carrier to charge or receive a greater or less compensation for transportation of property, "or for

any service in connection therewith," than the charges specified in the tariff.

34 Stat. 587.

The purpose of Congress to have but one rate which shall be immutable and to prevent utterly all forms of unjust discrimination requires that icing charges shall be regarded in the same light as other charges within the purview of the Act.

If the consignee is not liable because it did not actually know or even might not have ascertained at the time of delivery of the shipments that the ice was furnished, then it would be possible for carriers lawfully to omit from freight bills, and thus remit to shippers or consignees charges not only for icing, but charges for a multitude of services growing out of interstate transportation, such as elevation, transfer in transit, ventilation, and storage, the amount of which might not be definitely ascertained in advance.

Mr. Chief Justice White in *New York, New Haven & Hartford R.R. Co.* v. *I.C.C.*, 200 U.S. 361, 392, said:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about."

3. Prior dealing between the parties.

It cannot be ruled, by this Court, as a matter of law, that the Railroad Company was not entitled to its judgment for the undercharges on the last five

carloads of cantaloupes and the pie-plant and peaches because the consignee had previously declined to be placed on the Railroad Company's credit list and become obligated to pay all charges on future freight consignments, nor because of the evidence of a prior custom whereby the York & Whitney Company had returned to the Railroad Company bills for undercharges arising in similar cases (Record, p. 33). The effect of this was for the State Court, which held that these circumstances were merely to be weighed with the other evidence, and did not require a reversal of the judgment of the Superior Court (Record, p. 49).

Dower v. *Richards, supra.*

Western Union Tel. Co. v. *Call Publishing Co.*, 181 U.S. 92, 103.

Yosemite Gold Mining & Milling Co. v. *Emerson*, 208 U.S. 25, 32.

Chicago & Eastern Illinois R.R. v. *Collins Produce Co.*, 249 U.S. 186, 192.

Cornelius & Co. v. *Central of Georgia Ry.*, 13 Ala. App. 533.

B. Estoppel and Recoupment.

THE STATE COURT WAS CORRECT IN HOLDING JUSTIFIED THE FINDING THAT THE RAILROAD COMPANY WAS NOT ESTOPPED TO COLLECT THE UNDERCHARGES ON THE LAST FIVE CARLOADS OF CANTALOUPES AND ON THE PIE-PLANT AND PEACHES, AND THAT THE YORK & WHITNEY COMPANY COULD NOT RECOUP DAMAGES.

The doctrine of estoppel and recoupment cannot be successfully invoked in defense of an action to recover

the lawfully prescribed rates on interstate shipments. This Court said in—

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. *Fink, supra,* 582, 583:

"Nor can the defendant in error [consignee] successfully invoke the principle of estoppel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute."

Texas & Pacific Ry. v. *Mugg, supra.*
Pennsylvania R.R. v. *Titus, supra.*
Louisiana Ry. & Navigation Co. v. *Holly, supra.*

In *Central Railroad of New Jersey* v. *Mauser,* 241 Pa. 603, 608, the Court said:

"Here equitable principles play no part; not in order that the carrier may be protected from the consequences of its negligence, but that the Federal Statute, which forbids that freight rates should be made the subject of contract between carrier and shipper, may find its full enforcement despite the mistakes of both or either."

In *New York, New Haven & Hartford R.R. Co.* v. *York & Whitney Co., supra,* 40, the Court said:

"Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation, which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties

would be. . . . Estoppel cannot rest on an illegal contract. . . . The same reasoning makes ineffectual the defendant's [consignee's] argument for recoupment . . ."

See also *Illinois Central R.R.* v. *Henderson Elevator Co.*, 226 U.S. 441.

In *Central Railroad of New Jersey* v. *MacCartney*, 68 N.J. Law, 165 (1902), the Court held that the Railroad Company was estopped to collect a balance of freight charges from a consignee who had settled with the shipper on the basis of the amount originally paid. This decision may not be opposed to the principles stated. Although the shipment was carried by lighter from Brooklyn, New York, to Jersey City, it was transported under waybills originating within New Jersey, and its destination was within that State. The decision apparently proceeds upon the ground that the shipment was intrastate (Record, p. 51; *Pennsylvania R.R.* v. *Titus*, 156 App. Div. N.Y. 830, 836).

CONCLUSION.

The judgment of the State Court against the Railroad Company on the first item in the account annexed to the declaration (Record, p. 12), for undercharges on the first carload of cantaloupes, should be reversed, as a matter of law, because the decision is repugnant to the Interstate Commerce Act and the interstate bill of lading.

The judgment of the State Court in favor of the Railroad Company for the undercharges on the remaining five carloads of cantaloupes and for the icing

charges on the pie-plant and peaches should be affirmed, because there was no error in the interpretation and application of the Interstate Commerce Act by the State Court.

Respectfully submitted,

WILLIAM L. PARSONS,

Counsel for THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Office Supreme Court, U. S.
FILED
APR 21 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States.

October Term, 1920.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

PLAINTIFF IN ERROR AND PETITIONER,

v.

YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY,

PLAINTIFF IN ERROR AND PETITIONER,

v.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Brief for York & Whitney Company,

Plaintiff in Error and Petitioner,
Defendant in Error and Respondent.

AMOS L. TAYLOR,
ADAMS & BLINN,
Attorneys.

ANDREW C. SMITH'S SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Statement of the proceedings	1
Statement of the case	3
Specifications of alleged errors	11
Argument	13
I. Jurisdiction	13
II. There was no agreement, express or implied, whereby York & Whitney Company became liable to pay the undercharges and refrigeration charges in question	15
1. The fundamental ruling right	15
2. The shipper and carrier bound by Act	15
3. Not liable as shipper or owner	17
4. Not liable under the terms of the bill of lading	18
5. Mere acceptance does not establish liability	19
6. Custom of the trade binding on the carrier	23
7. Past dealings between the parties significant	23
8. As to the lien	24
9. As to the first car of cantaloupe	25
10. As to the remaining five cars of cantaloupe	26
11. Liability does not turn upon knowledge of established rates	31
12. As to the icing charges	32
III. As to estoppel	37
IV. As to recoupment	45
V. Conclusion	46

CASES, STATUTES, AND AUTHORITIES CITED.

Page

Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172 48

Bills of Lading, In the matter of, 14 I.C.C. Rep. 346, at 349 18

Birdsey v. Butterfield, 34 Wis. 52 46

Blanchard v. Page, 8 Gray, 281, 295 19

Boston & Maine R.R. v. Whitcher, 1 Allen, 497, 498 19

Central of Georgia Ry. v. Southern Ferro Concrete Co., 193 Ala. 108 21, 31

Central R.R. Co. v. MacCartney, 68 N.J. L. 165, pp. 173, 175 (39 Vroom, 165) 20, 31, 37, 38

Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Rudy, 173 Ind. 181 46

Coleman v. Lewis, 183 Mass. 485 46

Corpus Juris, vol. 10, pp. 445, 446, and cases cited 19, 21

Cox v. Central Vermont R.R., 170 Mass. 129, 136 19

Deans v. Eldredge, 217 Mass. 583, 588 37

Drake v. Wild, 70 Vt. 52 44

Ewart on Estoppel, p. 77 43

Freeman v. Kemendo, 148 S.W. 605 (Tex.) 43

Gulf, Colorado & Santa Fé Ry. Co. v. Hefley, 158 U.S. 98 16, 24, 29

Hutchinson on Carriers, vol. 2 (3d ed.), sec. 807 19, 20

Illinois Central R.R. v. Henderson Elevator Co., 226 U.S. 441 16

Judicial Code, sec. 237, Act of September 6, 1916, c. 448, 39 Stat. 726 14

Kilgore v. Bruce, 166 Mass. 136 46

Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 16

Page

Lufburrow v. Henderson, 30 Ga. 482 46
New Orleans & Northeastern R.R. Co. v. Scarlet, 249 U.S. 528 14
New York Central & Hudson River R.R. Co. v. York & Whitney Co., 230 Mass. 216, 217, 218, 219, 222, 223 15, 25, 26, 34, 36
N.Y., N.H. & H. R.R. Co. v. York & Whitney Co., 215 Mass. 36 21, 41
Old Colony R.R. Co. v. Wilder, 137 Mass. 536 19
Pennsylvania Railroad Co. v. Titus, 216 N.Y. 17 22
Pittsburgh &c. Ry. Co. v. Fink, 250 U.S. 577 16
Pomeroy on Eq. Jur. (3d ed.), p. 1439 43, 44
Railway Company v. Jones, 73 Miss. 110, 122 44
Reed v. Home Savings Bank, 130 Mass. 443 48
Rogers v. Humphrey, 39 Me. 382 46
Sears v. Wingate, 3 Allen, 103 45
St. L., Iron Mt. & Southern Ry. Co. v. McWhirter, 229 U.S. 265, at 277 13
St. L., Iron Mt. & Southern Ry. Co. v. Starbird, 243 U.S. 592, 601 14
St. L., Iron Mt. & Southern Ry. Co. v. Taylor, 210 U.S. 281 14
South Deerfield &c. Co. v. N.Y., N.H. & H. R.R. Co., 222 Mass. 535 23
Story's Eq. Jur. vol. 1, p. 207, and note 44
Strong v. Carver Cotton Gin Co., 202 Mass. 209, at 212 47
Texas & Pacific Ry. v. Mugg, 202 U.S. 242 16
Tirrell v. Gage, 4 Allen, 245, 253 19
Utermehle v. Norment, 197 U.S. 40, 56, and cases cited 43
Wooster v. Tarr, 8 Allen, 270 24, 29
Yazoo & Miss. Valley R.R. Co. v. Mullins, 249 U.S. 531 14

Supreme Court of the United States.

October Term, 1920.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error and Petitioner,
v.
YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY,
Plaintiff in Error and Petitioner,
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

BRIEF FOR YORK & WHITNEY COMPANY,

Plaintiff in Error and Petitioner,
Defendant in Error and Respondent.

Statement of the Proceedings.

This is an action of contract brought by the New York Central & Hudson River Railroad Company, as lessee of the Boston & Albany Railroad, a common carrier, to recover a balance of freight and refrigeration charges on various interstate shipments of produce

consigned to York & Whitney Company, a fruit and produce commission merchant, at Boston, Massachusetts (Record, p. 1).

The declaration is upon an account annexed of nine items; the first six involve undercharges and the last three involve refrigeration charges (Record, pp. 12-14). The answer sets up payment in full settlement, the giving of a receipt, and discharge in full by the carrier, estoppel, equitable defenses growing out of errors on the part of the carrier, laches, and recoupment (Record, pp. 15-19). The case was tried to a jury on an agreed statement of facts (Record, pp. 19-35). After the parties had rested, both parties moved that the Court direct a verdict in its favor, respectively, as a matter of law on the facts as agreed (Record, p. 1). The Court declined to make any ruling at that time, stating that he wished to have a jury pass upon certain issues before making any rulings, and, subject to the exception of both parties, the Court submitted thirty questions to the jury (Record, pp. 1-4).

Both parties made various requests for instructions and rulings, some of which were given and others refused (Record, pp. 4-10). After the answers of the jury, York & Whitney Company moved that the answers to all the questions other than the first, second, third, fourth, thirteenth, and twenty-second be set aside, but this motion was denied, and the Court instructed the jury to return a verdict for York & Whitney Company on the first count and for the carrier on the remaining eight counts in the sum of seven hundred nineteen (719) dollars, and a verdict was rendered accordingly. "The rights of both par-

ties on all questions were duly saved" (Record, p. 11). Thereupon the Court reported all questions of law raised upon the record for the determination of the Supreme Judicial Court for the Commonwealth of Massachusetts (Record, p. 11).

On May 24, 1918, a rescript was handed down by that Court of "Judgment for the plaintiff on the verdict" (Record, p. 52). The opinion by Rugg, C.J., is in the record (pp. 43-51). Thereafter, in accordance with said rescript, judgment was duly entered on December 18, 1919, in the sum of eight hundred thirty-eight and 97/100 (838.97) dollars damages and one hundred thirty and 39/100 (130.39) dollars costs of suit (Record, p. 54).

The issues are brought to this Court in four ways: by writ of error on the petition of York & Whitney Company (Record, pp. 58-65); on a writ of certiorari granted on its petition (Record, p. 76); by cross-writ of error on petition of the New York Central & Hudson River Railroad Company (Record, pp. 68-73); and on cross-writ of certiorari granted on its petition, with stipulation as to printing (Record, pp. 74, 76).

Statement of the Case.

This Railroad Company, the initial carrier, and all intervening carriers were and are common carriers of freight engaged in interstate commerce (Record, p. 34). During the period covered by this case York & Whitney Company was a dealer in fruit and produce in Boston. It handled a large part of its business as a commission merchant, and this fact was known to the Railroad Company and to the Boston

freight agents of the other carriers over whose lines the freight in question moved (Record, pp. 32, 33).

Each of the first six items of the account annexed was for an undercharge on a carload of cantaloupes consigned by the Payette Valley Melon Growers' Association from Payette, Idaho, to York & Whitney Company at Boston (Record, p. 20). The cars were respectively shipped on August 31 and September 1, 2, 4, 5, and 11, and arrived in Boston on September 11, 11, 12, 14, 16, and 20, in the year 1911 (Record, pp. 21-22). York & Whitney Company's first information as to these carloads of cantaloupes was a telegram that they were on the way, received by it September 10. The Payette Valley Melon Growers' Association was previously unknown to York & Whitney Company (Record, p. 33). Upon receiving notice of the arrival of the first car, that is, on September 11, York & Whitney Company notified the Railroad Company that it was not the owner of the six carloads, but was receiving them merely in its capacity as commission merchant and as agent for the shipper (Record, pp. 20, 21, 32, 33). On the same day the Railroad Company delivered to York & Whitney Company a freight bill, which York & Whitney Company paid and the Railroad Company receipted and returned to York & Whitney Company. The Railroad Company rendered York & Whitney Company freight bills on the five other cars, which bills York & Whitney Company paid, respectively, on September 20, 20, 23, 28, and 28. The bills were receipted by Railroad Company and returned to York & Whitney Company (Record, pp. 21, 22, 36-40). York & Whitney Company accepted all said cars after hav-

ing received and paid the freight bill for the first car, as above set forth. Each was accepted on the day on which York & Whitney Company paid the freight bill therefor (Record, p. 23). Before accepting the first carload, however, York & Whitney Company wrote to the Railroad Company's traffic manager a letter asking for information as to tariff rates on cantaloupes in carload lots under refrigeration from Payette, Idaho, to Boston, Massachusetts (Record, p. 23). On September 15 it received a letter from the general freight agent of the Railroad Company giving such rates (Record, pp. 1, 24, 25). According to this letter the rates were:

Transportation, 75¢ per hundred pounds, Payette to Chicago.
39¢ per hundred pounds, Chicago to Boston.
Refrigeration, $65 per car.

According to the duly established tariff the rates were:

Transportation, 75¢ per hundred pounds, Payette to Chicago.
39¢ per hundred pounds, Chicago to Boston.
Refrigeration, $65 per car.
$15 extra if ventilators open to first re-icing station.
$5 detention for twenty-four hours or fraction thereof, after the first twenty-four hours.

Record, p. 29.

Melons had never before been shipped from Idaho to Boston. There was no joint rate through. The proper rate was ascertained by finding the rate to Chicago and a proportional rate from Chicago to Boston over different roads and contained in different tariffs issued by the several roads (Record, p. 29).

The bills as rendered were made up on the basis of transportation at 75¢ per hundred pounds. By mistake of agents at Chicago of a connecting carrier, repeated by the Railroad Company, the transportation charges from Chicago to Boston were not added (Record, p. 29). The proper charges for detention were added; also a charge of $65 per car for refrigeration ($75 on last car) (Record, pp. 38-41). York & Whitney Company did not know that the carrier furnished refrigeration to the first re-icing station with ventilators open, nor that any cars were detained at Payette more than twenty-four hours. The bills do not clearly indicate the items of the charges. The charges as stated in the account annexed (Record, pp. 12-14) are correct according to the tariffs (Record, p. 29).

The seventh, eighth, and ninth items (Record, p. 14) of the account annexed may be dealt with together, the seventh being an undercharge on a carload of pie-plant shipped from Chicago, Illinois, the eighth and ninth each for an undercharge on a carload of peaches shipped from Hamlin, New York, consigned to York & Whitney Company at Boston. The undercharges were in each case for icing the cars, each bill of lading provided that the car should be kept iced, such car was re-iced as claimed by the

Railroad Company, such re-icing was necessary, and the charge made therefor was correct according to the tariffs. York & Whitney Company did not know of such re-icing and did not suspect that the car in question would be iced more than twice until it received a supplemental bill therefor after it had in each case settled with the consignor. Before removing the goods from a car York & Whitney Company received a delivery check from the Railroad Company stating the charges thereon, and thereupon accepted the car. Thereafter, on the same day, York & Whitney Company received a freight bill for the amount stated in the delivery check, which it paid, and remitted the net balance of the proceeds of the sale to the consignor after deducting its commission. Thereafter York & Whitney Company had no funds of the consignor in its hands. York & Whitney Company never had possession of any bills of lading nor had any knowledge of them until the Railroad Company made its claim for extra icing (Record, pp. 29-32).

All of the shipments in question were made to York & Whitney Company as a commission merchant, and this fact was expressly communicated to the Railroad Company as to the six carloads of cantaloupes (Record, p. 33). Except as above stated, York & Whitney Company had no actual knowledge of the proper rate covering the several shipments in question (Record, p. 35).

Produce dealers throughout the country consign and ship to York & Whitney Company and to other produce dealers at Boston, Massachusetts, produce for sale on commission at the market prices, and it receives such from persons entirely unknown to it.

The consignor of the six carloads of melons was entirely unknown to it. All produce involved herein was perishable property, requiring that it be sold at once to avoid serious loss. It is a custom of the trade among commission merchants at Boston to sell goods so consigned to them at the best market prices and to remit the amount received after deducting charges. "A successful conduct of the commission business especially requires immediate remittances" (Record, p. 33). For many years York & Whitney Company had received from the Railroad Company and the Boston & Albany Railroad Company, its predecessor in conducting the freight terminal business at Boston, Massachusetts, supplemental bills for freight rates, icing, terminal, and other charges which were, through inadvertence, omitted from the original bill as rendered and paid by it in each case. Where settlement had been made with the shipper it had always returned said freight bills with a statement that it had settled with its principal, that the goods were commission goods, that it had no funds of its principal to pay the additional charges, and referred the carrier to the consignor with such additional information as to the identity, location, and responsibility of the consignor as it possessed to enable the carrier to collect the balance of lawful rates from the shipper. No suit had ever been brought against it to recover on such supplemental bills, but in case it had funds of the shipper in its hands it paid the Railroad Company such supplemental bills out of such funds belonging to the shipper, and "There had been no change in this custom up to the several times the plaintiff [Railroad Com-

pany] delivered to the defendant [York & Whitney Company] the produce herein before set forth" (Record, pp. 33, 34).

Prior to the shipments in question the Railroad Company sent to York & Whitney Company a request that it execute with the Railroad Company a contract whereby the Railroad Company would agree that York & Whitney Company might be upon its weekly credit list, and in consideration of this privilege York & Whitney Company would agree with the Railroad Company to pay the latter all lawful charges for freight and other incidental expenses upon goods which might be consigned to it at Boston, Massachusetts, but it expressly declined to sign, and informed the Railroad Company that such contract would be disastrous to it, since oftentimes it has refused to accept consignments of highly perishable property sent to it at Boston, Massachusetts, where the condition of the goods, state of the market, and the responsibility of the shipper, or any of them, were not satisfactory to it. From that time on the Railroad Company allowed the defendant to accept goods without paying the charges in advance, but the Railroad Company has, on the same day, rendered York & Whitney Company a bill for the charges and the same has been paid immediately, if not in advance (Record, p. 34).

At the times when the consignments herein were delivered nothing was said about paying freight and other charges thereon, and York & Whitney Company "did not agree to pay any charges at the time not disclosed to it as aforesaid except and unless as herein set forth" (Record, p. 34). The several tariffs

governing the shipments in question were in bound pamphlets, the largest containing fifty-seven pages, which were closely printed, with schedules, cross-references, rules, regulations, and indices. They are from time to time amended by supplements, but only two supplements are in force at any one time. It is difficult for one not familiar with the schedules to ascertain the proper rates. The Railroad Company and all the other carriers in question employ men who are experts (Record, p. 34).

As to each carload of produce referred to in each item of the account annexed to the declaration the jury were asked:

> "Did or did not the defendant [York & Whitney Company] accept [the carload in question] understanding that the plaintiff [the Railroad Company] looked to the defendant [York & Whitney Company] for the payment of all freight and other lawful transportation charges thereon?"

As to the first carload of cantaloupe the jury answered "No." As to all the other eight items the jury answered "Yes."

As to each carload of produce referred to as above the jury were further asked:

> "Did or did not the defendant [York & Whitney Company] impliedly agree with the plaintiff [the Railroad Company] to pay the balance of freight and transportation charges as set forth in the . . . item [in question] of the account annexed to the declaration?"

As to the first carload of cantaloupe the jury answered "No." As to all the other eight items the jury answered "Yes."

As to each carload of produce referred to as above the jury were further asked:

> "Is or is not the plaintiff [the Railroad Company] estopped from maintaining its claim against the defendant [York & Whitney Company] as set out in the . . . item [in question] of the account annexed to its declaration?"

As to the first carload of cantaloupe the jury answered "Yes." As to all the other eight items the jury answered "No" (Record, pp. 1-4).

Specifications of Alleged Errors.

The assignments of error (Record, pp. 59-61) in different forms raise the question whether York & Whitney Company's liability as commission merchant and consignee for undercharges and icing charges on commission consignments is in any way determined or controlled by the Interstate Commerce Act, so called (Act of Congress approved February 4, 1887, c. 104; 24 Stat. 379; with amendments), whether it did or did not actually know all the published tariffs and whether the Railroad Company did or did not know that the goods in question were commission shipments. The Railroad Company claims the right to recover under the Federal statute, at least under the first item; York & Whitney Company denies it under all the items (Assignment 1). York & Whitney Company relies upon all the assignments. They may be reduced, however, to the following:

1. The Court erred in so construing the so-called Interstate Commerce Act as to hold in substance that it was bound by that Act to find that York & Whitney Company, a commission merchant, and neither the shipper nor the owner of the merchandise set forth in items 2 to 8, both inclusive, of the account annexed to the declaration under "straight" bills of lading which never came to its knowledge, could not legally have entered into a contract with the Railroad Company for the delivery of such merchandise to York & Whitney Company upon the payment of a less amount than the freight rates fixed in accordance with such Act where York & Whitney Company had actual information of the correct tariff rates prior to delivery. This question is raised broadly by the first, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error.

2. The Court erred in so construing the Interstate Commerce Act, so called, as to hold in substance that it was bound by that Act to find that the Railroad Company was not estopped to maintain the action as to all but the first item in the account annexed against the York & Whitney Company, a commission merchant, and neither the shipper nor the owner of the merchandise in question under "straight" bills of lading which never came to its knowledge, for the excess of freight and other rates fixed by the tariffs adopted under said Act over the amount stated by the Railroad Company to York & Whitney Company at or before delivery. This question is raised directly or indirectly by all the assignments of error, but especially by the second, eighth, ninth, tenth,

eleventh, twelfth, thirteenth, fourteenth, and fifteenth.

3. The Court erred in so construing the Interstate Commerce Act, so called, as to hold in substance that it was bound by that Act to find that the York & Whitney Company, a commission merchant, and neither the owner nor the shipper of the goods in question under "straight" bills of lading which never came to its knowledge or possession, was not entitled to recoup against the Railroad Company the damages suffered by it for misrepresentations by the Railroad Company to the York & Whitney Company of the amount of such rates which it expected the York & Whitney Company to pay. This question is raised directly or indirectly by all the assignments of error, and especially by the first, third, sixth, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth.

Argument.

I. Jurisdiction.

York & Whitney Company contends that the decision against it in the Massachusetts Court was made by reason of an incorrect construction given by that Court to the Interstate Commerce Act. This is, of course, a Federal question. The ruling below is reviewable, because it inherently involves the effect and operation of the said Act. The decision established liability on items 2 to 9, both inclusive, of the account annexed to the declaration by reason of an incorrect construction.

St. L., Iron Mt. & Southern Ry. Co. v. *McWhirter*, 229 U.S. 265, at 277.

St. L., Iron Mt. & Southern Ry. Co. v. *Taylor*, 210 U.S. 281.
St. L., Iron Mt. & Southern Ry. Co. v. *Starbird*, 243 U.S. 592, 601.

It is entirely immaterial whether the United States Supreme Court passes upon the questions herein raised under the writ of error or under the writ of certiorari. Both methods are now before the Court. It earnestly prays, however, that the Court will decide the questions under one method or the other.

New Orleans & Northeastern R.R. Co. v. *Scarlet*, 249 U.S. 528.
Yazoo & Miss. Valley R.R. Co. v. *Mullins*, 249 U.S. 531.

It may be fairly urged that, under section 237 of the Judicial Code, Act of September 6, 1916, c. 448; 39 Stat. 726, below, there was drawn in question the validity of a Federal statute and the authority exercised under the United States, and the decision against the York & Whitney Company was in favor of their validity; further, York & Whitney Company contends that the transactions in question, in so far as it is concerned, were governed solely by the State laws, and the decision below is, in substance, based on the ground of such laws being repugnant to the laws of the United States and against the validity of such State laws; also that York & Whitney Company has claimed rights, privileges, and immunities under the Federal statute and the authority exercised thereunder, namely, the right to be let alone by the Interstate Commerce Act in these transactions, and

the decision is against the rights and privileges so claimed.

II. There was No Agreement, Express or Implied, Whereby York & Whitney Company became Liable to Pay the Undercharges and Refrigeration Charges in Question.

1. The Fundamental Ruling Right.

The Court below was right in holding that the Interstate Commerce Act was applicable only to those who expressly or by implication became parties to the contract of transportation, and that whether one is or has become such a party must be determined by the general principles of the common law.

230 Mass. 216, 217 (Record, p. 46).

Under this ruling the Court below held that York & Whitney Company was not a party to the contract in the case of the first item, and ordered judgment for York & Whitney Company thereon. This ruling was right. The Railroad Company seeks to attack this ruling as erroneous, and asserts as a matter of law by virtue of the Interstate Commerce Act that York & Whitney Company became a party to the contract, and bound thereby.

2. The Shipper and Carrier Bound by Act.

We recognize that the shipper is a necessary party to the contract in all cases and that his liability in all cases is determined by the Interstate Commerce Act and published tariffs. As stated in—

Louisville & Nashville R.R. Co. v. *Maxwell*, 237 U.S. 94, 97:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed."

Erroneous quotation of rates cannot avail the shipper.

Texas & Pacific Ry. v. *Mugg*, 202 U.S. 242.

Illinois Central R.R. v. *Henderson Elevator Co.*, 226 U.S. 441.

Likewise, the extent of the carrier's lien is determined by the act and tariffs.

Gulf, Colorado & Santa Fé Ry. v. *Hefley*, 158 U.S. 98.

Pittsburgh &c. Ry. Co. v. *Fink*, 250 U.S. 577.

The effect of these decisions and others of the same tenor is recognized as in full force and effect governing the shipper and the carrier. They do not, however, in all cases govern the consignee, and especially they do not govern the consignee where he is an involuntary one.

3. Not Liable as Shipper or Owner.

York & Whitney Company was not the shipper in any case, nor was it the owner in any case. It was simply the agent for the owner. Further, it has been agreed as a fact that the Railroad Company actually knew that York & Whitney Company was not the owner, but acted as commission merchant before the delivery of any of the six carloads of cantaloupe. Hence the finding of the jury as to the five cars of cantaloupe that York & Whitney Company impliedly agreed to pay the balance of the freight charges cannot be supported on the ground that the Railroad Company really treated York & Whitney Company as owner and it thereby impliedly agreed to pay the established tariffs under the Interstate Commerce Act.

As to the five cars of cantaloupe, the Massachusetts Court held (Record, p. 50): "The defendant [York & Whitney Company] was the consignee of all these goods. That was some evidence that it was owner." This might and probably would have been some evidence had nothing else appeared, but it was expressly agreed between the parties in the agreed statement of facts that York & Whitney Company was not the owner of any of the produce in question, and, further, this information was expressly communicated to the Railroad Company prior to the delivery of the six cars of cantaloupe. Likewise, the shipments for which icing charges are made, involved in the seventh, eighth, and ninth items, were received considerably after the cantaloupes were received, and the Railroad Company then had notice from York & Whitney Company that the defendant wished to know what the

charges were before it decided to accept the consignments. Hence, neither the Court nor the jury could have found that the Railroad Company treated York & Whitney Company as owner of the six cars of cantaloupe in any event.

4. Not Liable under the Terms of the Bill of Lading.

It has long been settled that a consignee who accepts goods under a bill of lading containing provisions that he shall pay the freight and which was known to him at the time thereby becomes a party to the contract and agrees to pay the freight. There was no such provision in any of the bills of lading involved here. They stated that the "owner or consignee" should pay the freight and other lawful charges. Hence the liability of the owner satisfies the terms of the bill of lading. Furthermore, none of these bills of lading ever came to the possession of York & Whitney Company, and it had no knowledge of their contents until after the delivery. It cannot be presumed to know the terms, although it may have known of the uniform bill of lading adopted, since special bills of lading may be issued for particular commodities, including perishable property.

In the Matter of Bills of Lading, 14 I.C.C. Rep. 346, at 349.

All the goods in question here were very perishable, and it was necessary that they be sold at once to avoid loss.

5. Mere Acceptance does Not Establish Liability.

The acceptance of the goods by the agent after the knowledge communicated to the carrier that it was acting as agent establishes no implied contract to pay the freight. It is held in—

> *Boston & Maine Railroad* v. *Whitcher*, 1 Allen, 497, at 498:
>
> "In such a case the essential elements of a contract are wanting. There is nothing from which an intent on the part of the shipper or carrier to charge the agent or an agreement by the agent to pay the freight can be inferred. A mere naked consignment to an agent does not make him liable for the freight whether the agency is known and there is no stipulation that the consignee shall pay the freight."
>
> *Old Colony R.R. Co.* v. *Wilder*, 137 Mass. 536.
>
> *Blanchard* v. *Page*, 8 Gray, 281, 295.
>
> *Tirrell* v. *Gage*, 4 Allen, 245, 253.
>
> 10 Corpus Juris, pp. 445, 446, and cases cited.
>
> 2 Hutchinson on Carriers (3d ed.), sec. 807.
>
> *Cox* v. *Central Vermont R.R.*, 170 Mass. 129, 136.

The only theory upon which acceptance of the goods results in an implied contract to pay the lawful charges must be based on the fact that York & Whitney Company knew that by accepting and removing the goods the carrier was giving up its lien for

charges. This does not control the situation, because it paid all the charges requested at or prior to delivery.

2 Hutchinson on Carriers (3d ed.), sec. 807, says:

> "But the mere acceptance and removal of the goods by the consignee with knowledge that the carrier is giving up for his benefit a lien on the goods for a stated amount does not create an obligation on the part of the consignee to pay charges beyond the amount stated."

In the well-considered case of—

> *Central Railroad Co.* v. *MacCartney*, 73 N.J. L. 165, on page 173—

Pitney, J., says:

> "Where one accepts delivery of goods from a common carrier, receiving at the same time a statement plainly setting forth the amount of freight charges thereon, with knowledge that the carrier is giving up for the benefit of the consignee a lien upon the goods for the amounts so stated, such conduct by the consignee is, of course, cogent evidence, and, standing unexplained and uncontradicted, is sufficient evidence of an implied promise to pay the stated amount of the charges.
>
> "Such an undertaking was undoubtedly made by the defendants in this case. That undertaking has been performed by them, but we fail to see in the facts as certified to us by trial court, anything to support a finding that the defendant, by anything that transpired at or after the

delivery of the ties, undertook and promised to pay freight charges indefinite in amount, or any sum beyond that which was stated on the bills as rendered.

"If the plaintiff, the railroad company, instead of waiving its lien had insisted upon retaining the ties until payment of the freight, at the same time rendering to the defendants the freight bills, as, in fact, they were rendered, and if the defendants had thereupon paid the bills in order to secure the ties, could a further liability be imposed upon them simply on the ground that the bills as rendered did not include the entire charges? We think not. In such case the plaintiff would have been left to its action against the consignor, as the party on whose engagement service was performed."

These authorities were followed in *Central of Georgia Railway Company* v. *Southern Ferro Concrete Company*, 193 Ala. 108. See also 10 C.J. pp. 446-447, Tit. Carriers.

The case of *New York, New Haven, and Hartford Railroad Company* v. *York and Whitney Company*, 215 Mass. 36, is distinguishable on this fact from the New Jersey case, as the Court pointed out, and is also distinguishable from the case at bar. In that case a finding for the carrier against a consignee for an undercharge was sustained on the ground either that York & Whitney Company by accepting goods under a bill of lading which provided that the consignee should pay the freight impliedly agreed to pay the lawful freight, or that the Railroad Company was

entitled to rely on the presumption that York & Whitney Company was the owner of the goods. The case of *Pennsylvania Railroad Company* v. *Titus*, 216 N.Y. 17, was also decided on these grounds. Obviously, the freight referred to in a bill of lading is the lawful freight, that is, the rate fixed by the Interstate Commerce Act and the published tariffs thereunder, and it follows from a finding that York & Whitney Company impliedly agreed to the terms of such bill of lading that York & Whitney Company impliedly promised to pay the freight so fixed. So the implied liability of an owner for freight is a liability implied from the benefit which accrues to him from the carriage of the goods (see 10 C.J. 447, Tit. Carriers, and cases cited) and is for the reasonable value of the carrier's service, which, of course, is the amount fixed by published tariff. As already pointed out, neither of these grounds of liability is present in the case at bar. The present case is one of "mere acceptance and removal of the goods by the consignee with knowledge that the carrier is giving up for his benefit a lien upon the goods for a stated amount.

This case is governed by the agreed facts (Record, p. 34), as follows:

> "At the time when the consignments hereinbefore described were respectively delivered nothing was said by the plaintiff [Railroad Company] to the defendant [York & Whitney Company] about paying the freight and other charges thereon and the defendant [York & Whitney Company] did not agree to pay any charges at the time not disclosed to it as aforesaid except and unless as herein set forth."

It is very clear that the Railroad Company never considered the question of collecting the lawful rates from York & Whitney Company, and the case should be governed by the principles stated in Hutchinson on Carriers and applied in the New Jersey and Alabama cases cited.

6. Custom of the Trade Binding on the Carrier.

There is nothing in the evidence to take the case out of the rule stated under the last heading. In fact, the custom of the trade at Boston among commission merchants and with the carriers, fully set forth in the record (pp. 33, 34), is very important as supporting the general conclusion of the common law. This custom among commission merchants was to sell the goods immediately at the best market prices and remit the net amount to the consignor after deducting all known charges, and a successful conduct of the commission business requires immediate remittances. For many years where York & Whitney Company had settled with its principal for commission goods and undercharges were afterwards discovered, no suit had ever been brought by this carrier, who had been referred to the shipper for collection. This custom became a part of the contract and was binding upon the carrier.

South Deerfield, &c. Co. v. *N.Y., N.H. & H. R.R. Co.*, 222 Mass. 535.

7. Past Dealings between the Parties Significant.

Further, the attitude of this carrier is clearly shown by the fact that, before any of the shipments in question were received, the Railroad Company re-

quested York & Whitney Company to be placed upon the weekly credit list and to agree to pay all lawful charges of freight, etc. York & Whitney Company declined, informing the Railroad Company that it often refused to accept highly perishable property where the condition of the goods, the state of the market, the responsibility of the shipper, or any of them were not satisfactory. Since then delivery checks were issued showing charges and bills rendered and paid the same day (Record, p. 34).

8. As to the Lien.

Hence, the only right the Railroad Company had against York & Whitney Company was the right to hold the goods until its lien was discharged. The possible extent of the lien is the lawful tariff rates. See—

Gulf, Colorado & Santa Fé Railway Co. v. *Hefley*, 158 U.S. 98.

But the Railroad Company was not bound to enforce its lien. Under the bills of lading the carrier could collect the lawful charges from either the shipper or the consignee. Waiver of the lien as against the consignee does not relieve the shipper, and the terms of the bill of lading would be fully satisfied.

Wooster v. *Tarr*, 8 Allen, 270.

Of course the carrier will not be permitted to waive the lien and collect from the consignee either nothing or only a part of the lawful rates in case this would amount to a fraud or collusion, or indirectly accomplish what the law forbids. Nothing of this sort ap-

pears from the record in this case, and it has not been suggested. Hence it can have no bearing in determining the issues. What the parties did in the case at bar was done absolutely in good faith throughout.

9. As to the First Car of Cantaloupe.

The Massachusetts Court applied the foregoing rules of the common law to the first car of cantaloupe shipped correctly, and held in substance that York & Whitney Company was not called upon to pay charges other than those demanded of it at or prior to delivery.

230 Mass. at 218 (Record, p. 47)—

where the Court said:

> "The defendant told the plaintiff that it was receiving these goods not as owner but merely on commission and that it would not accept them until the plaintiff informed it upon what terms it would release the goods to it. When these terms were stated it accepted them. Its agreement was not a general one to pay the legal tariff, but a special agreement to pay only the amount demanded."

Up to this point the decision of the Massachusetts Court was correct, and judgment for York & Whitney Company as to the first car was properly and necessarily ordered.

The contention of the railroad company below was squarely made that judgment should have been ordered for it on the first item, not "on an implied

agreement arising at the common law but on the Interstate Commerce Act and the Interstate bill of lading" (Record, pp. 47, 48). Hence the contention made by the Railroad Company, without doubt, raises a Federal question.

10. As to the Remaining Five Cars of Cantaloupe.

As to the remaining five cars of cantaloupe, and, in fact, as to the rest of the items, the Massachusetts Court erred by the interjection of the Interstate Commerce Act into the case and by deciding thereunder in substance that, because of that Act, after actual knowledge by York & Whitney Company of the established tariffs, there was an implied contract to pay the established tariff rates. The Court said (230 Mass. at 219; Record, p. 48):

> "It was bound to know also that the only charge which the plaintiff actually could make was that established by the published tariff."

The facts show that York & Whitney Company had asked for the charges, had been informed by telephone prior to the delivery of the first car, and correctly informed as to the tariff rates by letter after the delivery of the first car and before the delivery of the other cars. Also, it had been given a delivery check with the amount of the *charge* thereon for each of the succeeding five cars prior to delivery. These *charges* were quite similar to the amount actually paid on the first car. The Railroad Company had been told in advance that all the six cars were commission goods and that York & Whitney Company must know

"What the Charges would be before it decided to accept the consignment" (Record, p. 20). It is significant that it asked for the "Charges," and not for the tariff rates. Upon learning the charges in each case prior to delivery as shown by the delivery slips it concluded and had a right to conclude that the amounts stated were the amounts for which the Railroad Company was willing to surrender its lien. There is nothing in the Interstate Commerce Act which in any way modifies or affects this; otherwise a carrier could not deliver goods to a consignee without collecting the full freight rates. This we submit is not the law.

Of course, the carrier cannot collect from the consignee as the lawful tariff or in complete settlement of the lawful tariff a sum less than the tariff rates. It concedes that the legal rate is that fixed by the tariffs and is the same by whomever paid. Its position, however, is that the shipper is liable for the freight rates and can and must be held for the full amount. The consignee, however, when he is neither the shipper nor the owner and is liable only under an implied contract, and especially where he is the agent for an owner, is liable only to the amount of the charges demanded at or before delivery. In fact, the carrier may deliver the goods to the consignee without any payment, or upon a full or a partial payment. This was the common law. The Interstate Commerce Act in no way disturbs it.

Nor was the Interstate Commerce Act passed having in view the practice of consignees. Discrimination in freight rates was made for shippers and owners, who might be pecuniarily interested. In order

to prevent rebates and discriminations it was essential, by the Interstate Commerce Act, to fix the liability of the shipper or the owner for freight rates, and these cannot be changed. To this extent only does the Interstate Commerce Act go.

Though the *prima facie* liability for freight rates is on the shipper, it may be assumed by some other person. Such other person—as, for example, a consignee—may contract for the carriage of the goods. When such other person contracts for the carriage of the goods in such manner that the shipper is no longer under liability therefor, such contractor is, of course, subject to the same rules as a shipper. In other words, freight rates as such cannot be changed in amount by contract or otherwise. They are conclusively fixed by the Interstate Commerce Act and the published tariffs. It is on the principle above stated that an owner-consignee is held liable for freight rates as fixed by the published tariffs. If he is the person who contracts with the carrier for the carriage of the goods, his liability is substituted for the liability of the shipper, and must be fixed in extent by the same rules as is the shipper's liability. If such owner does not enter into an express contract for the carriage of the goods, his liability is based upon a contract implied from the benefit which accrues to him from the carriage of the goods. His liability is for the reasonable value of the carrier's service, which, of course, is the amount fixed by the published tariffs. If, therefore, the liability of an owner is simply implied from the benefit received by him or is an express liability substituted for the liability of the shipper, the extent of the liability must

be fixed by the Interstate Commerce Act and the published tariffs.

In addition to its claims against shipper and owner for freight rates, a carrier has another method of collecting such charges, to wit, it has a lien for them and may retain possession of the goods until the charges are paid. This lien is for freight rates *as such*. Since the amount of freight rates is fixed by the Interstate Commerce Act and the published tariffs, it necessarily follows that the extent of the lien is the freight rates as so fixed.

See *Gulf, Colorado & Santa Fé Railway* v. *Hefley*, 158 U.S. 98.

It does not follow, however, that the carrier is bound to enforce its lien. Waiver of lien by the carrier does not relieve the shipper from liability.

Wooster v. *Tarr*, 8 Allen, 270.

Consequently, the carrier may give up his lien by delivering the goods to the consignee and still retain all its rights against the shipper. The Interstate Commerce Act is satisfied so long as the carrier retains its full rights to collect against the shipper.

The liability of the shipper or the owner to pay the freight is a general express contract, the amount to be paid being fixed by the tariff rates. If the consignee, who is not the owner or shipper, receives the goods, there is an implied contract only to pay the amount demanded, in consideration for the surrender of the carrier's lien. These contracts are clearly distinguished, and have nothing whatever to do with each other. Since the delivery of the goods, which

are subject to a lien for freight charges, to a consignee without any payment does not discharge the express contract, such delivery may be made without violating the Interstate Commerce Act, *a fortiori*, such delivery may be made to a consignee upon the payment of part of the freight charges provided such carrier does not receive such payment in full satisfaction of its claim. The carrier is not legally allowed to receive such payment in full nor to agree to do so.

It is seen, therefore, that liability for the remaining five cars of cantaloupe cannot rest on the fact that the Railroad Company treated York & Whitney Company as the owner. Knowledge to the contrary was known in advance. Nor can it rest upon the implied contract to pay the lawful rates. The past course of dealings between the parties and the custom of the trade at Boston and the fact that no contract was made "except and unless as herein [Agreed Facts, Record, p. 34] set forth" clearly show that there was no evidence of such contract, express or implied, other than the Interstate Commerce Act and the published tariffs.

It follows from the foregoing that the Interstate Commerce Act affects only the primary liability for freight rates under the express contract. It has no bearing whatever upon the liability which a consignee incurs under an implied contract by the acceptance of the goods. This is a common-law contract, and can be in no way affected by the Interstate Commerce Act. The Railroad Company contends, and the Massachusetts Court in substance decided, that this implied contract was affected by the Interstate Commerce Act.

The denial by the trial Court of the requests for rulings made by York & Whitney Company numbered 84, 85, 86, and 87 (Record, p. 10) was consequently erroneous. See Assignments of Error 1, 4, 5, 6, 7, 8, 9, 10, 11, and 13 (Record, pp. 59-61).

Further, the granting of the Railroad Company's requests for instructions 11, 21, 22, and 23 (Record, p. 5) was also erroneous.

11. Liability does Not Turn upon Knowledge of Established Rates.

The Massachusetts Court based its decision of no liability for the first item on the fact that York & Whitney Company did not actually know the established rates before delivery (although it presumably knew them), but it was liable for the succeeding five items because it did actually know the tariff rates before delivery. The Federal Act provides that the tariff rates are notice to all the world. Legally, York & Whitney Company did know them. The contract was a special one to pay what was demanded (230 Mass. 218, Record, p. 47). Knowledge of the established rate has no bearing, since nothing might have been demanded.

> *Central of Georgia Railway* v. *Southern Ferro Concrete Co.*, 193 Ala. 108.
> *Central Railroad Co.* v. *MacCartney, supra.*

Furthermore, actual knowledge of all items of the freight bills in question could not have been known by York & Whitney Company in advance. The only

thing it knew or could have known was the established tariff rates with possible detention and refrigeration charges. It did not know of any detention charges nor have reason to suspect them, nor did it know what might have been the correct refrigeration charge, as refrigeration is paid for at established rates and not in bulk, as seen under the next sub-division. The rule laid down by the Massachusetts Court is impossible of application—at least, as to everything except the freight rate *per se*. Clearly the Interstate Commerce Act does not contemplate that the Act shall govern a part of the transaction and the common law the rest of the transaction in the case of each shipment.

The Massachusetts Court held in substance that York & Whitney Company was liable for the established tariffs on the cantaloupe after it had received actual knowledge of the established rates under the Interstate Commerce Act, and not before. This is by virtue of the construction of the Interstate Commerce Act, and was error.

12. As to the Icing Charges.

Items 7, 8, and 9 are for icing charges. York & Whitney Company before delivery was given delivery slips showing charges, including the usual icing charges. Each bill contained an item for icing twice. York & Whitney Company had no knowledge of the charges in question and no reason to suspect that the cars would be iced more than twice (Record, pp. 30, 31). It later was discovered (perhaps on account of the weather conditions) that each of the three

cars had to be iced three times. Apparently, through the mistake of the Railroad Company, or a prior carrier, there was a failure to attach a memorandum of one icing charge on each car, so that when the delivery slip was made up there was a memorandum of only two icings for each car. As above seen, York & Whitney Company as commission merchant must know all charges it is to pay before delivery in order to decide whether to accept delivery or not. There is apparently no way on earth for any one to tell what icing charges may exist. There is and can be no tariff which prescribes how often or where goods shall be iced. It must be left to the judgment of the carrier's employee in charge of the cars. Cars may be iced more than is ordinarily necessary. The shipper makes a hard-and-fast contract to pay whatever icing charges may be incurred. That is a part of his contract. The consignee, who is neither the shipper nor the owner, simply makes a contract to pay the charges disclosed to him at or prior to delivery. This is a stronger case even than that of the cantaloupe. The consignee could not even surmise what icing charges might exist other than those which would ordinarily exist. Further, as the goods are highly perishable, the carrier, of course, desires the acceptance by the consignee to avoid a public sale to collect its charges, as the goods cannot be returned. The implied contract found by the Court below to pay these charges has no basis, in fact or in law.

The Court apparently, by virtue of the Interstate Commerce Act, puts the consignee in the shoes of the shipper in the absence of special and accurate knowledge by the consignee of the published tariffs and

the actual icing charges, which latter, in fact, cannot be ascertained sometimes for days afterwards. Further, the Court below laid stress on the fact that the Railroad Company had no actual knowledge that these were commission transactions, stating (230 Mass. 223; Record, p. 51):

> "Under these conditions the plaintiff [Railroad Company] had the right as a matter of law to regard and deal with the consignee [York & Whitney Company] as the owner."

This was not the common law. It has always been held that there was only a *presumption of ownership* on the part of the consignee, and this presumption was completely rebutted by the agreed statement of facts at the trial. It is admitted that the consignee here was not the owner of any of the nine items, but acted simply as commission merchant.

Further, the Railroad Company had express knowledge that the cantaloupe were commission transactions; that York & Whitney Company must know the charges before it decided to accept the consignments. All the other facts set forth in the record had taken place and were known to the Railroad Company when the three consignments involved in items 7, 8, and 9 were received. The cantaloupes were received in August and September, 1911. The consignment involved in item 7 was received in April, 1912, and those involved in items 8 and 9 in September, 1912. Further, it is agreed that York & Whitney Company "did not agree to pay any charges at the time not disclosed to it as aforesaid except and unless as herein set forth" (Record, p. 34). At the common law there could have

been no liability. This modification of the common law was based on the Interstate Commerce Act, and was erroneous.

The purpose of the Interstate Commerce Act is accomplished if it is construed as above set forth. That purpose was to insure equality as to freight rates, that is, to prevent discrimination or rebating. In order to accomplish this purpose it is essential that the amount of freight rates be unchangeable in any manner. Whenever the amount of freight rates is in question, that Act governs. In the cases in which the liability of shipper or consignee-owner has been under consideration, the question was flatly whether the amount of freight rates could be changed by contract or otherwise. The purpose of the Interstate Commerce Act may, however, be accomplished without requiring that the liability which is assumed by a consignee by acceptance of goods shall be the full liability for the freight rates. If the liability assumed by such consignee is less than for the full amount of the freight rates, the carrier may still resort to the shipper for the balance. The Interstate Commerce Act does not require that the consignee come under any liability. Consequently, if the consignee accep's the goods and pays the carrier the amount stated by the carrier to be the freight charges thereon, the Interstate Commerce Act does not require that such consignee shall come under further liability.

If it be suggested that in some cases the carrier cannot collect the charges from the shipper because of lack of financial responsibility, this is the concern of the carrier in making the original express contract. No discrimination would result anyway, because in

such cases usually York & Whitney Company will not accept the goods unless satisfied of the responsibility of the shipper as well as the other facts. If this perishable property is not accepted by the consignee, it must then be sold at auction at market prices, and the carrier in the end would lose more probably. This would be the greater of the two evils for the carrier.

Generally speaking, as to the seven items where liability was established below on an implied contract, the basis for the implication of a promise to pay the established tariff rates was found to be the Interstate Commerce Act. The Court said (230 Mass. at 222; Record, p. 50):

> "The defendant knew also that an inexorable and immutable rate was established by law, which the carrier was bound to charge to somebody, and that it might incur serious liability for failure to collect. That factor alone may the more readily incline the mind to the belief that both parties were dealing with each other on the footing that the lawful rate was to be collected."

Further, on page 223 (Record, p. 51), the Massachusetts Court said, speaking of the MacCartney case in New Jersey:

> "No reference is made in the opinion in the latter case to the Interstate Commerce Act, and the decision proceeds seemingly upon a footing that it was an intrastate shipment. It seems to us that a different inference under those circumstances might be required by law or at least be permissible by a jury."

III.

As to Estoppel.

Even if the decision of the Massachusetts Court to the effect that York & Whitney Company had impliedly contracted to pay the lawful freight rates can be sustained, the decision of that Court to the effect that the Railroad Company was not estopped to maintain an action on that contract cannot be sustained.

If York & Whitney Company is correct in its position that it could have made an express contract with the Railroad Company for the delivery of the goods upon the payment of a sum less than the freight rates thereon fixed by the published tariffs under the Interstate Commerce Act, this reason for holding that there was no estoppel falls to the ground. The Massachusetts Court held that there was a lawful contract as to the first carload of cantaloupe to pay less than the tariff rates. Hence it is established by that Court that such a contract was lawful. The Court then decides, in substance, that an implied contract to pay less than the tariff rates was unlawful as to the other seven items. Since there could have been an express contract, there might have been an estoppel. Neither such express contract nor such estoppel is contrary to law, and is in no way prohibited by the Interstate Commerce Act.

The defense of estoppel is recognized in Massachusetts (*Deans* v. *Eldredge,* 217 Mass. 583, 588), "Where one's conduct is such as to induce another to change his situation."

The case of *Central Railroad Co.* v. *MacCartney,*

68 N.J. L. 165, already referred to, also dealt with estoppel. The carrier in that case was held to be estopped from demanding any greater sum than it demanded when the goods (in that case, railroad ties) were delivered to the consignee.

The Court, by Mr. Justice Pitney, at page 174, said:

> "The whole situation was such as to render it, in common fairness, quite essential that the railroad company should furnish correct freight bills at the time of delivery of the ties, if they desired to hold the defendants personally liable for the freight. The error in the freight bills was the result of gross negligence on the part of the agents of the plaintiff. Can the defendants be made to suffer for it?
>
> "The doctrine of estoppel, although a creature of equity and depending upon equitable principles is recognized and enforced alike by the courts both of law and of equity. . . .
>
> "The essential elements which must unite in order to create an equitable estoppel by conduct may be stated with approximate accuracy as follows:—
>
> "1. That the party against whom the estoppel is urged has, on a previous occasion, by words or conduct, made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.
>
> "2. That such party either knew the facts to be otherwise than represented, or except for gross negligence would have known, or that he pretend-

ed to know the facts when he knew that he did not know them.

"3. That such representation or concealment was made either with the intent to influence the conduct of another or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true.

"4. That the party to whom it was made was ignorant of the facts and had no convenient opportunity to ascertain them.

"5. That the latter party, in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation.

"In short, an equitable estoppel prevents one from rectifying his own grossly negligent mistake at the expense of another who has, without negligence, been misled thereby."

These elements were present in the case at bar:

1. The Railroad Company in the case of each carload of freight made a representation of the charges thereon which was inconsistent with the facts as to the charges fixed by published tariffs. In the case of the first carload there were both a statement by telephone and a freight bill before delivery (Record, pp. 20, 36); in the case of the next five carloads a delivery check and freight bill (Record, p. 21); and in the case of each of the last three a delivery check before the removal of the goods and on the same day

a freight bill (Record, pp. 30-32). The charges stated were in all cases less than tariff rates.

2. The Railroad Company and the other carriers were common carriers of freight, and "at the time of said shipments in question employed men who were and are experts" in ascertaining the proper rates (Record, p. 34). By stating the charges and by issuing delivery checks and freight bills the Railroad Company pretended to know, and represented that it knew, that the amounts which it expected York & Whitney Company to pay were correct.

3. The representations of the amounts of the charges were made with intent to influence York & Whitney Company to pay the freight charges. In respect to the six carloads of cantaloupes York & Whitney Company stated to the Railroad Company's agent "that it wished to know what the CHARGES would be before it accepted the consignment" (Record, p. 20). Clearly the representations were made under such conditions that a reasonably prudent man would suppose they were intended to be acted upon as true.

4. York & Whitney Company was ignorant as to correct rates for the first carload of cantaloupes and as to the carload of pie-plant and the carloads of peaches. It was also ignorant as to correct rates for the other five carloads of cantaloupes, though, by reason of the letter received by it (Record, p. 24) on September 15, it had some information as to such rates in addition to that contained in the freight bills therefor (Record, p. 36, etc.). Such information, however, would not have been sufficient to enable York & Whitney Company to determine whether or not

the bills were based on the lawful rates. Each one of the bills contained a refrigeration charge, and some of them a detention charge (Record, pp. 38-41). York & Whitney Company had and could have had no knowledge as to these. It "believed that the charges as billed were computed by experts employed by the plaintiff [Railroad Company] and the other carriers were correct" (Record, p. 35), especially in so far as it had anything to do with the amount of charges which it expected York & Whitney Company to pay for the surrender of its lien.

5. York & Whitney Company in good faith relied upon the Railroad Company's representations, paid the freight bill in each case, and remitted to the consignor all the net profits of the sales and has absolutely nothing in its hands with which to pay additional charges (Record, pp. 26-28, 30-33). The consignor of the six carloads of cantaloupes was an "association of fruit growers without capital which ceased to do business shortly after shipping the said six carloads of cantaloupes" (Record, p. 28).

There was, therefore, an estoppel in the case of each item unless there is a rule of law to the contrary growing out of the application of the Interstate Commerce Act. In the case of *New York, New Haven, & Hartford Railroad Company* v. *York & Whitney Company* (215 Mass. 36) the Court said (p. 40):

> "Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation, which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties

would be. Such a contract would be of no avail in any aspect, because contrary to law. Estoppel cannot rest on an illegal contract."

The opinion in that case was written by Rugg, C.J., and he also wrote the opinion in the case at bar. He apparently adopted and followed the opinion in the first case in all matters except as under the facts governing the first car of cantaloupe which were different from the facts in the prior case. However, we have already seen that the charges to be collected from a consignee who is neither the shipper nor the owner are not "fixed by rigid law," but, on the contrary, special contract for delivery may be made for an amount less than the tariff rates. The important thing was what York & Whitney Company must pay to get possession to sell the consignments on the market at a price sufficient to pay all expenses and its commissions at least. The Railroad Company by telephone, by delivery checks and freight bills, told York & Whitney Company what it expected to collect from the latter. The elements of estoppel are complete at the common law. There is nothing in the Interstate Commerce Act to change this. The Massachusetts Court has held in substance otherwise, and such is error.

The Railroad Company has argued that, as the rate is fixed by law, the misrepresentation it made was a misrepresentation of law rather than fact, and that York & Whitney Company was bound to know the law and the established tariffs. The answer is—

First. That the misrepresentation as between the carrier and the consignee, who was neither the ship-

per nor the owner, but the agent for the shipper, is one purely of fact at the common law. Established tariffs are in no way applicable, as hereinbefore seen, provided the carrier sees fit to accept a lesser sum for the abandonment of its lien. And, further, even if the amount of the rate is fixed by law, the nature of the rate remains unchanged. It is still a question of fact. A freight rate is ordinarily a matter of fact.

See *Freeman* v. *Kemendo*, 148 S.W. 605 (Tex.).

There is in a case like the one at bar no reason of public policy for failure to give to a misrepresentation of a freight charge the effect normally given to a misrepresentation of fact.

Secondly. That, even if the misrepresentation was one of law, it may be the basis of estoppel. The argument to the contrary is based upon the principle that every one is supposed to know the law, and consequently there can be no relief from a mistake of law. There are, however, numerous exceptions to this rule. It does not apply to cases of misrepresentation.

See *Utermehle* v. *Norment*, 197 U.S. 40, 56, and cases cited.

Though "ignorance of plain law will not excuse yet advantage must not be taken of such ignorance."

Ewart on Estoppel, p. 77.

See also Pomeroy on Equity Jurisprudence (3d ed.), p. 1439.

Here we are dealing not with a simple case of mistake of law—if it is a mistake of law—but with a misrepresentation of law. The principle stated is especially true between persons who do not stand on an equal footing.

See Story's Equity Jurisprudence, vol. 1, p. 207, note.

In the case at bar the parties did not stand on an equal footing. With reference to the freight schedules applicable to the carriage of the goods in question, it is agreed that "it is difficult for anyone not familiar with such schedules to ascertain the proper charge on any shipment; the plaintiff and the said initial carrier and other carriers were and are common carriers of freight and at the time of said shipments in question had in their employ men who were and are experts in such matters." Finally, the doctrine that ignorance of the law excuses no man has no application to the mistakes of persons as to their private legal rights and interests.

Pomeroy, *supra*, p. 1484.

See also *Railway Company* v. *Jones*, 73 Miss. 110, 122.

Drake v. *Wild*, 70 Vt. 52.

There is therefore nothing in the Interstate Commerce Act which should have prevented the Massachusetts Court from finding that the Railroad Company was estopped to maintain its action. By the denial of the motion for judgment, motion to discharge issues, and the refusal to give the eighty-second, eighty-third, eighty-fourth, eighty-fifth, eighty-sixth,

and eighty-seventh requests for rulings (Record, p. 10) below and the giving of the Railroad Company's eleventh, twenty-first, twenty-second, and twenty-third instructions to the jury (Record, p. 5) below, the Court below held otherwise. The Massachusetts Court reached its decision that it was bound by the Interstate Commerce Act to hold that there could be no estoppel. This was error, and the question is fairly raised by the second, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error (Record, pp. 59, 60).

IV. As to Recoupment.

Even if the decision of the Massachusetts Court, to the effect that York & Whitney Company had impliedly contracted to pay the freight rates fixed by the Interstate Commerce Act and the published tariffs, can be sustained, the decision of that Court to the effect that York & Whitney Company is not entitled to recoup cannot be sustained.

The basis of the claim of York & Whitney Company for recoupment is that it suffered damages by the misrepresentation of the Railroad Company as to the freight charges. The reasons which make it possible to set up such misrepresentation as working an estoppel support the claim of York & Whitney Company for recoupment. There was a misrepresentation on the part of the Railroad Company. Whether this was a misrepresentation of fact, as York & Whitney Company claims, or of law, it would have been the basis for an action for damages. Among the cases on the general subject of recoupment may be cited:

Sears v. *Wingate*, 3 Allen, 103.

Kilgore v. *Bruce*, 166 Mass. 136.
Coleman v. *Lewis*, 183 Mass. 485.
Lufburrow v. *Henderson*, 30 Ga. 482.
Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. *Rudy*, 173 Ind. 181.
Rogers v. *Humphrey*, 39 Me. 382.
Birdsey v. *Butterfield*, 34 Wis. 52.

In cases where the Interstate Commerce Act fixes beyond possibility of change the amount which must be paid to a carrier, misrepresentation as to such amount is not a basis for an action. The reason is, of course, that on grounds of public policy the contracting party is held to be charged with notice of the amount of the freight rate. Where, however, it is possible for a contract to be made for a lesser sum, as here (see II, *supra*), there is no reason in public policy why misrepresentation of the amount of the freight rate should not be the basis for an action, and consequently for recoupment.

Since the Massachusetts Court reached its decision on the ground that it was bound by the Interstate Commerce Act to hold that there could be no recoupment, it was error, and should be reversed. This question was raised by its requests for rulings numbered 56 to 64, inclusive, below (Record, pp. 8, 9), and is now raised by its assignments of error numbered 1, 3, 13, 14, and 15.

V. Conclusion.

Under the report made by Mr. Justice Bell of the Superior Court for the County of Suffolk the decision must be reversed, and judgment should be en-

tered for York & Whitney Company with costs. The report provides (Record, pp. 11, 12):

> "If my rulings were correct, judgment is to be entered for the plaintiff [Railroad Company] on the verdict, but if my rulings in whole or in part were wrong such judgment shall be entered or order made as ought to have been made by me."

The foregoing was done pursuant to the provisions of section 105 of chapter 173 of the Revised Laws of Massachusetts, as amended by section 5 of chapter 555 of the Acts passed by the General Court of Massachusetts in the year 1910, which was the law governing the case at the time the report was made and which is as follows:

> "SECTION 105. A justice of the supreme judicial court or of the superior court, after verdict, or after a finding of the facts by the court, may report the case for determination by the full court. If the justice is of opinion that an interlocutory finding or order made by him ought to be determined by the full court before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties."

The justice had full authority to make the report in this case.

> *Strong* v. *Carver Cotton Gin Company*, 202 Mass. 209, at 212.

Berenson v. *London & Lancashire Fire Ins. Company*, 201 Mass. 172.
Reed v. *Home Savings Bank*, 130 Mass. 443.

Furthermore, the record further stated (Record, p. 11):

> "Thereupon, by agreement of both parties, I hereby report all questions of law raised upon this record for the determination by the Supreme Judicial Court for the Commonwealth."

Many rulings were made and requests refused which should have been given, as hereinbefore seen, and especially the eighty-fourth, eighty-fifth, eighty-sixth, and eighty-seventh requests of York & Whitney Company (Record, p. 10); likewise the eleventh, twenty-first, twenty-second, and twenty-third requests by the Railroad Company for instructions to the jury were given (Record, p. 5), and were erroneous.

As there was error in the rulings given and in the rulings refused, "such judgment shall be entered or order made as ought to have been made." It is clear from what has been said that an order should have been made for judgment for York & Whitney Company on all the items; hence such an order should now be made, with costs.

Respectfully submitted,
YORK & WHITNEY COMPANY,
By AMOS L. TAYLOR,
ADAMS & BLINN,
Attorneys.